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Vol. I

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 144

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

PAUL MELLON, DAVID K. E. BRUCE, AND DONALD D. SHEPARD, EXECUTORS OF THE ESTATE OF A. W. MELLON, DECEASED

No. 145

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1937

CERTIORARI GRANTED OCTOBER 11, 1937

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Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, may be found the following words and figures:

Docket Entries.

In re: A. W. Mellon v. D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-third District of Pennsylvania. No. 6980 Law.

March 23, 1932. Praecipe for summons in assumpsit filed. Summons issued. Summons returned served on D. B. Heiner on March 23, at Pittsburgh, Pa.

April 8, 1932. Praecipe for appearance of Louis E. Graham and John A. McCann for defendant filed.

October 23, 1933. Praecipe for appearance of D. D. Shepard for plaintiff filed.

October 24, 1933. Statement of claim filed.

August 3, 1934. Affidavit of defense filed, with acceptance of service thereon.

September 26, 1934. On motion of defendant, order entered vacating trial setting for October 4, 1934; and fixing Monday, October 29, 1934, as the date for trial.

October 22, 1934. Notice of application to file amended affidavit of defense, together with order allowing same to be filed and acceptance of service thereon.

October 26, 1934. Reply of plaintiff to new matter filed, with acceptance of service thereon.

October 29, 1934. Hearing commences before Judge Gibson.

October 30, 1934. Hearing continued.

October 31, 1934. Trial closed. Trial memo filed.

December 10, 1934. Request for findings of fact and conclusions of law filed.

February 17, 1936. Opinion, findings of fact, conclusions of law and order filed, directing that judgment be entered in favor of plaintiff and against defendant in the sum of $202,502.22, with interest from April 1, 1927. Pursuant to above order judgment is hereby entered in favor of A. W. Mellon and against D. B. Heiner, individually and as collector, in the sum of $202,502.22, with interest from April 1, 1927.

G. H. Berger, *Clerk.*

April 16, 1936. On motion of defendant order entered extending time to July 1, 1936, for filing of bill of exceptions of defendant.

May 13, 1936. Notice of appeal and acceptance of service filed. Petition and order for *supersedeas* appeal. Assignment of errors filed.

May 14, 1936. Citation issued returnable June 13, 1936.

May 15, 1936. Service accepted, and citation mailed to Circuit Court of Appeals.

June 10, 1936. Stipulation filed and order entered extending date for filing transcript of record to July 10, 1936.

June 20, 1936. Stipulation filed and order entefed extending time for filing bill of exceptions to August 1, 1936, extending time for filing appeal record to August 10, 1936. Stipulation filed and order entered consolidating case 6979 and 6980 Law; and agreeing that one bill of exceptions shall be sufficient.

June 30, 1936. Stipulation filed and order entered permitting the plaintiff and defendant to submit certain exhibits to the Circuit Court of Appeals.

Bill of exceptions filed by leave of Court.

Docket Entries.

In re: Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, v. D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-third District of Pennsylvania. No. 6979 Law.

March 23, 1932. Praecipe for summons in assumpsit filed. Summons issued. Summons returned served on D. B. Heiner on March 23, at Pittsburgh, Pa.

April 8, 1932. Praecipe for appearance of Louis E. Graham and John A. McCann for defendant filed.

October 23, 1933. Praecipe for appearance of D. D. Shepard for plaintiff filed.

October 24, 1933. Statement of Claim filed.

March 21, 1934. On petition of executors of R. B. Mellon estate order entered allowing executors to be substituted as plaintiffs in lieu of R. B. Mellon, dec'd.

August 3, 1934. Affidavit of defense filed, with acceptance of service thereon.

September 26, 1934. On motion of defendant, order entered vacating October 4, 1934, as the date for trial; and fixing October 29, 1934, as the date for trial.

October 22, 1934. Notice of application to file amended affidavit of defense together with order allowing same to be filed and acceptance of service thereon.

October 26, 1934. Reply of plaintiffs to new matter filed, with acceptance of service thereon.

October 29, 1934. Hearing before Judge Gibson.

October 30, 1934. Hearing continued.

October 31, 1934. Hearing concluded. Trial memo filed.

December 10, 1934. Request for findings of fact and conclusions of law filed.

February 17, 1936. Opinion, findings of fact and conclusions of law and order of court filed and entered directing that judgment be entered in favor of plaintiffs, Jennie K. Mellon, Richard K. Mellon, Sarah M.

Scaife and The Union Trust Company of Pittsburgh, executors of estate of R. B. Mellon, deceased, and against defendant, D. B. Heiner, individually and as former collector in the sum of $187,787.17, with interest from May 19, 1927. Pursuant to the above order judgment is hereby entered in favor of plaintiffs and against defendant in the sum of $187,787.17, with interest from May 19, 1927.

G. H. Berger, *Clerk.*

April 16, 1936. On motion of defendant order entered extending time to July 1, 1936, to file bill of exceptions.

May 13, 1936. Notice of appeal and acceptance of service filed. Petition and order for *supersedeas* appeal. Assignment of errors filed.

May 14, 1936. Citation issued returnable June 13, 1936.

May 15, 1936. Service accepted, and citation mailed to Circuit Court of Appeals.

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June 30, 1936. Stipulation filed and order entered permitting the plaintiff and defendant to submit certain exhibits to the Circuit Court of Appeals.

Bill of exceptions filed by leave of Court.

Statement of Claim.

No. 6980 Law.

(Filed Oct. 24, 1933.)

Defendant, D. B. Heiner, individually and as former Collector of Internal Revenue, is indebted to plaintiff, A. W. Mellon, in the sum of two hundred two thousand five hundred two and 22/100 dollars ($202,502.22), with interest thereon from the first day of April, 1927, upon a cause of action whereof the following is a statement:

1. Plaintiff, A. W. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and

has filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of $919,777.86 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	$229,944.46
June 15, 1921	229,944.46
September 15, 1921	220,293.77
September 15, 1921 (credit on account of overpayment of 1917 tax)	9,650.69
December 15, 1921	229,944.48
Total	$919,777.86

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $190,419.70 was disclosed.

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of $190,419.70 for the year 1920 as set forth in said Commissioner's letter

and served on plaintiff notice and demand for the payment within ten days of said sum of $190,419.70 together with interest thereon of $12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

7. On or about April 1, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $190,419.70 and $12,082.52.

8. For the reasons hereinafter stated, plaintiff was not subject to or liable for any additional tax for the year 1920. Plaintiff had, in fact, theretofore overpaid his tax by the amount of $27,066.55 for said year, but inasmuch as claim for refund of said amount is barred by the applicable statute of limitations, no claim is made herein for said overpayment of $27,066.55.

9. On or about December 12, 1918, plaintiff, his brother, R. B. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached hereto, made part hereof and marked Exhibits "A" and "B", respectively.

10. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by

the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

11. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships only as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D", respectively.

12. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and

all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

15. On December 2, 1919 and during said period of liquidation from 1919 to 1925 there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets of cash.

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

18. In his return for said year 1920, plaintiff erroneously included as taxable profit his undistributed

share of the so-called liquidating profits of A. Overholt & Company in the amount of $48,350.74, and his share of the so-called liquidating profits of West Overton Distilling Company in the amount of $5,960.55 although no part of the so-called profit from the liquidation of said partnerships was received by plaintiff until final distribution in the year 1925, nor was any part of said amount available to or subject to his demand. Inasmuch as both former partnerships were in the process of liquidation the income therefrom was not taxable until liquidation payments to the plaintiff exceeded the cost value of his interest in the partnership assets as of December 2, 1919, which did not occur until the year 1925.

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28, respectively.

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

> "Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925."
>
> "Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of $48,906.45 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This

deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

> "Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain."

24. Plaintiff agrees with the Commissioner that the profits and losses of the liquidating agent for the partnerships for each of the years 1920 to 1925, should not have been reported as taxable income or deducted as losses in the respective years, but should be taken into account in the year 1925, in determining the capital profit on final distribution in liquidation.

25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of $190,419.70 tax and $12,082.52 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon either as to the allowance or the disallowance thereof.

27. The said additional tax of $190,419.70 and the interest thereon of $12,082.52 was not due and owing to the Government of the United States. Plaintiff, in fact, overstated his taxable income on his return and overpaid his tax on the basis of said return. The income from the liquidation of the said two partnerships for the year 1920 was not taxable in that year. The said income was erroneously reported on the return and erroneously increased and included as taxable income by the Commissioner.

28. The Commissioner of Internal Revenue has included liquidating profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

29. The correct computation of plaintiff's tax liability and overpayment of tax for the year 1920 is attached hereto, made part hereof and marked Exhibit "E".

30. WHEREFORE, defendant is indebted to plaintiff in the sum of two hundred two thousand five hundred two and 22/100 dollars ($202,502.22) with interest

thereon from the first day of April, 1927, as provided by law.

D. D. SHEPARD,
SMITH, SHAW, MCCLAY & SEIFERT,
Attorneys for Plaintiff.

— —

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said county and commonwealth, personally appeared A. W. MELLON, who, being duly sworn according to lay, deposes and says that he has read the foregoing statement of claim and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

A. W. MELLON.

Sworn to and subscribed before me this 21st day of October, 1933.

M. E. CONNER,
(SEAL) *Notary Public.*

My commission expires March 11, 1937.

EXHIBIT "A".

THIS AGREEMENT

MADE the 12th day of December, 1918, between HENRY C. FRICK, of Pittsburgh, Pa., party of the first

part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to as the "Partners",

The undersigned, for many years, trading under the name of A. Overholt & Co., carried on the business of manufacturing, distilling and selling of spirituous liquors, and in the year 1907 caused to be organized a corporation (under the name of A. Overholt & Co.) to which was transferred the property and assets of said firm, the undersigned receiving capital stock of said Company, in the same proportions as their interest in said partnership, namely one-third to each; and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to re-convey and re-transfer to them as partners the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing, distilling and selling of spirituous liquors, and shall do business under the name of A. Overholt & Co. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in whatever amount may be mutually agreed upon, shall be contributed in the same

proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days written notice to the others, and upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)
ANDREW W. MELLON (SEAL)
RICHARD B. MELLON (SEAL)

EXHIBIT "B".

THIS AGREEMENT

MADE the 12th day of December, 1918, between HENRY C. FRICK, of Pittsburgh, Pa., party of the first

part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to the "Partners".

The undersigned, in the year 1906, caused to be organized a corporation (under the name of West Overton Distilling Company), for the purpose of manufacturing, distilling and selling spirituous liquors, and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to convey and transfer to them as partners, the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing, distilling and selling of spirituous liquors, and shall do business under the name of West Overton Distilling Company. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in whatever amount may be mutually agreed upon, shall be contributed in the same proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days' written notice to the others, and, upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall deem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)
ANDREW W. MELLON (SEAL)
RICHARD B. MELLON (SEAL)

EXHIBIT "C".

ARTICLES OF AGREEMENT

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of A. Overholt & Co., parties of the first part; and THE UNION TRUST COMPANY OF

PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, party of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners, trading under the firm name of A. Overholt & Co.; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of A. Overholt & Co.:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of the premises and of the sum of One ($1.00) Dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the

good will, trade marks, trade names, labels, etc., belonging to said copartnership.

To Have and To Hold the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

First. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effect hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

Second. By and with the proceeds of such sales and collections the said party of the second part shall first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

Third. By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts,

demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third (⅓) to the said Andrew W. Mellon, one-third (⅓) to the said Richard B. Mellon and one-third (⅓) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH. And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH. It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it

may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH. The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

WITNESS the due execution hereof the day and year aforesaid.

(Sgd.) ANDREW W. MELLON (SEAL)
(Sgd.) RICHARD B. MELLON (SEAL)

ATTEST:

(Sgd.) DE WALDT J. HICKS

(Sgd.) DE WALDT J. HICKS

THE UNION TRUST COMPANY OF PITTSBURGH, Liquidating Agent,

(Sgd.) H. C. MCELDOWNEY,
President.

ATTEST:

(Sgd.) JNO. A. IRWIN,
Secretary.

State of Pennsylvania,
County of Allegheny. } SS.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law acknowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DEWALDT J. HICKS,
Notary Public.

My commission expires: (N. P. SEAL)
Feb. 21st, 1923.

State of Pennsylvania,
County of Allegheny. } SS.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public

in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
(N. P. SEAL) *Notary Public.*

My commission expires Feb. 21st, 1923.

RECEIVED AND RECORDED
IN U. S. PATENT OFFICE
September 1, 1925, Liber C125, page 269

THOMAS E. ROBERTSON,
Commissioner of Patents.

State of Pennsylvania,
Fayette County. } ss.:

Recorded on this 24th day of July, A. D. 1933, in the Recorder's office of said County in Agreement Vol. 64, page 411. Given under my Hand and Seal of said Office the date above written.

(Sgd.) C. L. ARENSBERG, *Recorder.*

EXHIBIT "D".

ARTICLES OF AGREEMENT

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of West Overton Distilling Company, parties of the first part; and THE UNION TRUST COMPANY OF PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, part of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners trading under the firm name of West Overton Distilling Company; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of West Overton Distilling Company;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of

the premises and of the sum of One ($1.00) Dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the good will, trade marks, trade names, labels, etc., belonging to said copartnership.

TO HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effects hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

SECOND. By and with the proceeds of such sales and collections the said party of the second part shall first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

THIRD. By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts, demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third (⅓) to the said Andrew W. Mellon, one-third (⅓) to the said Richard B. Mellon and one-third (⅓) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH. And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said

parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH. It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH. The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint

JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

WITNESS the due execution hereof the day and year aforesaid.

(Sgd.) ANDREW W. MELLON (SEAL)
(Sgd.) RICHARD B. MELLON (SEAL)

ATTEST:
(Sgd.) DEWALDT J. HICKS
(Sgd.) DEWALDT J. HICKS

THE UNION TRUST COMPANY OF PITTSBURGH,
Liquidating Agent,
By (Sgd.) H. C. MCELDOWNEY,
President.

ATTEST:
(Sgd.) JNO. A. IRWIN,
Secretary

State of Pennsylvania,
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law ac-

knowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DEWALDT J. HICKS,
Notary Public.
(N. P. Seal)

My commission expires Feb. 21st, 1923.

State of Pennsylvania,
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.

My commission expires Feb. 21st, 1923.

Commonwealth of Pennsylvania,
County of Westmoreland. } ss.:

Recorded on this 8th day of June, A. D. 1923, in the Recorder's Office of said County in Deed Book, Vol. 718, page 531.

Given under my Hand and the Seal of the said Office the day and year aforesaid.

(Sgd.) HARRY S. MILLER,
Recorder.

(SEAL)

EXHIBIT "E"

Net income for 1920 as shown by Commissioner's letter dated February 21, 1927 ..		$1,813,876.62
Less: Income erroneously included as taxable by Commissioner:		
A. Overholt & Co.	$281,779.95	
West Overton Distilling Co.	52,814.28	334,594.23
Correct net income		$1,479,282.39
Not subject to normal tax as credits exceed the net income.		
Surtax on $1,000,000.00 graduated	$583,510.00	
Surtax on $479,282.39 @ 65%	311,533.55	
	$895,043.55	
Less tax paid at source	2,332.24	
Correct tax liability	$892,711.31	

Tax paid:		
With return	$919,777.86	
Additional tax	190,419.70	$1,110,197.56
Over paid		$ 217,486.25
Barred by statute of limitations		27,066.55
Tax refundable		$ 190,419.70
Interest paid		12,082.52
Amount of plaintiff's claim		$ 202,502.22

Statement of Claim.

No. 6979 Law.

(Filed Oct. 24, 1933.)

Defendant, D. B. Heiner, individually and as former Collector of Internal Revenue, is indebted to plaintiff, R. B. Mellon, in the sum of one hundred eighty-seven thousand seven hundred eighty-seven and 17/100 dollars ($187,787.17), with interest thereon from the nineteenth day of May, 1927, upon a cause of action whereof the following is a statement:

1. Plaintiff, R. B. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was insti-

tuted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and his filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of $406,673.28 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	$101,668.32
June 15, 1921	101,668.32
September 15, 1921	101,668.32
December 15, 1921	101,668.32
Total	$406,673.28

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $175,259.70 was disclosed.

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of $175,259.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $175,259.70 together with interest thereon of $12,527.47, and threatened to assess and collect additional interest, and make seizures if payment should not be made, within the specified ten days' time.

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $175,259.70 and $12,527.47.

8. For the reasons hereinafter stated, plaintiff was not subject to or liable for any additional tax for the year 1920. Plaintiff had, in fact, theretofore overpaid his tax by the amount of $38,952.14 for said year, but inasmuch as claim for refund of said amount is barred by the applicable statute of limitations, no claim is made herein for said overpayment of $38,952.14.

9. On or about December 12, 1918, plaintiff, his brother, A. W. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partner-

ship agreements are attached hereto, made part thereof and marked Exhibits "A" and "B", respectively.

10. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

11. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships only as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D", respectively.

12. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the

surviving partners and the estate of the deceased partner in the year 1925.

14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees or by the said liquidating agents, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

15. On December 2, 1919 and during said period of liquidation from 1919 to 1925 there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and

West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

18. In his return for said year 1920, plaintiff erroneously included as taxable profit his undistributed share of the so-called liquidating profits of A. Overholt & Company in the amount of $48,350.74, and his share of the so-called liquidating profits of West Overton Distilling Company in the amount of $5,960.55 although no part of the so-called profit from the liquidation of said partnerships was received by plaintiff until final distribution in the year 1925, nor was any part of said amount available to or subject to his demand. Inasmuch as both former partnerships were in the process of liquidation the income therefrom was not taxable until liquidation payments to the plaintiff exceeded the cost value of his interest in the partnership assets as of December 2, 1919, which did not occur until the year 1925.

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28, respectively.

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erron-

eously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

> "Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925."
>
> "Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of $41,008.84 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessments for that year was based, giving the following explanation:

> "Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain."

24. Plaintiff agrees with the Commissioner that the profits and losses of the liquidating agent for the partnerships for each of the years 1920 to 1925, should not have been reported as taxable income or deducted as losses in the respective years, but should be taken into account in the year 1925, in determining the capital profit on final distribution in liquidation.

25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of $175,259.70 and $12,527.47 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon either as to the allowance or the disallowance thereof.

27. The said additional tax of $175,259.70 and the interest thereon of $12,527.47 was not due and owing to the Government of the United States. Plaintiff, in fact, overstated his taxable income on his return and overpaid his tax on the basis of said return. The income from the liquidation of the said two partnerships for the year 1920 was not taxable in that year. The said income was erroneously reported on the return and erroneously increased and included as taxable income by the Commissioner.

28. The Commissioner of Internal Revenue has included liquidating profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for the year 1925. He has assessed and collected a tax on the same income in each of said years.

29. The correct computation of plaintiff's tax liability and overpayment of tax for the year 1920 is attached hereto, made part hereof and marked Exhibit "E".

30. WHEREFORE, defendant is indebted to plaintiff in the sum of one hundred eighty-seven thousand seven hundred eighty-seven and 17/100 dollars ($187,787.17) with interest thereon from the nineteenth day of May, 1927, as provided by law.

D. D. SHEPARD,
SMITH, SHAW, MCCLAY & SEIFERT,
Attorneys for Plaintiff.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said county and commonwealth, personally appeared R. B. MELLON, who, being duly sworn according to law, deposes and says that he has read the foregoing statement of claim and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

R. B. MELLON.

Sworn to and subscribed before me this 23rd day of October, 1933.

P. J. HYLAND,
(SEAL) *Notary Public.*

My Commission expires June 27, 1936.

EXHIBIT "A"

THIS AGREEMENT

MADE the 12th day of December, 1918, between HENRY C. FRICK, of Pittsburgh, Pa., party of the first part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to as the "Partners",

The undersigned, for many years, trading under the name of A. Overholt & Co., carried on the business of manufacturing, distilling and selling of spirituous liquors, and in the year 1907 caused to be organized a corporation (under the name of A. Overholt & Co.) to which was transferred the property and assets of said firm, the undersigned receiving capital stock of said Company in the same proportions as their interest in said partnership, namely one-third to each; and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to re-convey and re-transfer to them as partners the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing, distilling and selling of spirituous liquors, and shall do business under the name of A.

Overholt & Co. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in whatever amount may be mutually agreed upon, shall be contributed in the same proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days written notice to the others, and, upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)
ANDREW W. MELLON (SEAL)
RICHARD B. MELLON (SEAL)

EXHIBIT "B".

THIS AGREEMENT

MADE the 12th day of December, 1918, between HENRY C. FRICK, of Pittsburgh, Pa., party of the first part, ANDREW W. MELLON, of Pittsburgh, Pa., party of the second part, and RICHARD B. MELLON, of Pittsburgh, Pa., party of the third part, all of said parties being hereinafter referred to as the "Partners."

The undersigned, in the year 1906, caused to be organized a corporation (under the name of West Overton Distilling Company), for the purpose of manufacturing, distilling and selling spirituous liquors, and it now appearing to the undersigned that the said business can more conveniently and advantageously be carried on by them as partners, they have taken the necessary steps to cause the said corporation to convey and transfer to them as partners, the property and assets of said corporation.

In order to carry out said purpose the undersigned hereby evidence the partnership arrangement between them as follows:

Said partnership is formed for the purpose of manufacturing distilling and selling of spirituous liquors, and shall do business under the name of West Overton Distilling Company. The property and assets so transferred to said partnership shall be deemed to be the partnership capital, and the interest of each of the partners therein shall be an undivided one-third interest. Additional capital required, if any, in what-

ever amount may be mutually agreed upon, shall be contributed in the same proportions, and all losses and profits, as the case may be, shall be borne and divided in the same proportions. The business of the partnership is to begin January 1st, 1919.

Any partner may dissolve the partnership upon thirty days' written notice to the others, and, upon any such dissolution or other termination of the partnership, any partner shall have the right to give, and to sign the name of the firm and of the partners to, all necessary notices of dissolution.

In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable.

IN WITNESS WHEREOF, the partners have hereunto set their hands and seals. Executed in triplicate.

HENRY C. FRICK (SEAL)
ANDREW W. MELLON (SEAL)
RICHARD B. MELLON (SEAL)

EXHIBIT "C".

ARTICLES OF AGREEMENT

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of A. Overholt & Co., parties of the first part; and THE UNION TRUST COMPANY OF PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, party of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners, trading under the firm name of A. Overholt & Co.; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of A. Overholt & Co.:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of the premises and of the sum of One ($1.00) Dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby

grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the good will, trade marks, trade names, labels, etc., belonging to said copartnership.

TO HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effects hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

SECOND: By and with the proceeds of such sales and collections the said party of the second part shall first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

THIRD: By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts, demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third (⅓) to the said Andrew W. Mellon, one-third (⅓) to the said Richard B. Mellon and one-third (⅓) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH: And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH: It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH: The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgement, to the intent that the same may be duly recorded.

WITNESS the due execution hereof. the day and year aforesaid.

(Sgd.) ANDREW W. MELLON. (SEAL)
(Sgd.) RICHARD B. MELLON. (SEAL)

ATTEST:

(Sgd.) DE WALDT J. HICKS.

(Sgd.) DE WALDT J. HICKS.

THE UNION TRUST COMPANY OF PITTSBURGH,
Liquidating Agent.

(Sgd.) H. C. MCELDOWNEY,
President.

ATTEST:

(Sgd.) JNO. A. IRWIN,
Secretary.

State of Pennsylvania,
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law acknowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.
(N. P. SEAL)

My commission expires Feb. 21st, 1923.

State of Pennsylvania,
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.
(N. P. SEAL)

My commission expires Feb. 21st, 1923.

RECEIVED AND RECORDED
IN U. S. PATENT OFFICE

September 1, 1925, Liber C125, page 269

THOMAS E. ROBERTSON,
Commissioner of Patents.

State of Pennsylvania,
Fayette County. } ss.:

Recorded on this 24th day of July, A. D. 1933, in the Recorder's office of said County in Agreement Vol. 64, page 411. Given under my Hand and Seal of said Office the date above written.

(Sgd.) C. L. ARENSBERG,
Recorder.

EXHIBIT "D"

ARTICLES OF AGREEMENT.

MADE and entered into this 31st day of January, A. D. 1921, between ANDREW W. MELLON and RICHARD B. MELLON, both of the City of Pittsburgh, County of Allegheny and State of Pennsylvania, surviving partners under the firm of West Overton Distilling Company, parties of the first part; and THE UNION TRUST COMPANY OF PITTSBURGH, a corporation of the State of Pennsylvania, as Liquidating Agent, party of the second part.

WHEREAS, Henry C. Frick, Andrew W. Mellon and Richard B. Mellon, all of the City of Pittsburgh aforesaid, were copartners trading under the firm name of West Overton Distilling Company; and

WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of the said Henry C. Frick; and

WHEREAS, said copartnership has been in the process of liquidation since the date of the death of the said Henry C. Frick; and

WHEREAS, it is the desire of the said Andrew W. Mellon and Richard B. Mellon, surviving partners, to have The Union Trust Company of Pittsburgh liquidate the business of West Overton Distilling Company:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: That said parties of the first part, in consideration of the premises and of the sum of One ($1.00) Dollar to

them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, assign, transfer and set over unto the said party of the second part, its successors and assigns, forever:

ALL AND SINGULAR the lands, tenements, hereditaments and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt and property of every name and nature whatsoever, including the good will, trade marks, trade names, labels, etc., belonging to said copartnership.

TO HAVE AND TO HOLD the same and all the proceeds thereof to the said party of the second part, its successors and assigns, in trust, nevertheless, to and for the following intents and purposes, that is to say:

FIRST. The said party of the second part shall forthwith take possession of all and singular the lands, tenements, hereditaments, property and effects hereby assigned, and sell and dispose of the same at such times and for the best prices which it shall in its discretion be able to obtain, and to convert the same into money, and shall also collect all and singular the said debts, due bills, bonds, notes, accounts, claims, demands and choses in action, or so much thereof as may prove collectible, and thereupon execute, acknowledge and deliver all necessary conveyances and instruments for the purposes aforesaid.

SECOND. By and with the proceeds of such sales and collections the said party of the second part shall

first pay and disburse all of the lawful expenses, costs, charges and commissions of execution and carrying into effect this agreement.

THIRD. By and with the residue and remainder of said net proceeds and avails, the party of the second part shall pay and discharge all the other copartnership debts, demands and liabilities, whatsoever now existing, whether due or hereafter to become due, and if such net proceeds and avails shall be sufficient to pay and discharge all copartnership debts, demands and liabilities, then the balance of such net proceeds and avails shall be divided among the said Andrew W. Mellon, Richard B. Mellon and the Estate of Henry C. Frick, deceased, in equal proportions, that is to say, one-third (⅓) to the said Andrew W. Mellon, one-third (⅓) to the said Richard B. Mellon and one-third (⅓) to the said Estate of Henry C. Frick or their said respective executors, administrators or assigns.

FOURTH. And for the better execution of these presents and of the trusts hereby reposed, the said parties of the first part do hereby make, nominate, constitute and appoint the said party of the second part the true and lawful attorney, irrevocable, of them and of each of them, with full power and authority to do, transact and perform all acts, deeds, matters and things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of them, might or could do were these presents not executed; and attorneys, one or more, under it, to make, nominate and appoint, with full

power of substitution and revocation, hereby ratifying and confirming all and everything that our said attorneys or its attorneys shall do or cause to be done in the premises.

FIFTH. It is the intention of this agreement that the said The Union Trust Company of Pittsburgh, as Liquidating Agent, shall, until said copartnership assets shall have been sold and converted, manage, lease, repair, insure or otherwise deal with the same as it may deem best and in the meantime, but solely for the purpose of realizing the joint estate to the best advantage, carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property and to convert the same into money and to collect all debts, accounts, claims and demands due said copartnership estate, and in the exercise of said powers the said The Union Trust Company of Pittsburgh shall have full discretion and shall not be liable except for gross negligence.

SIXTH. The said The Union Trust Company of Pittsburgh hereby accepts the trust created by this agreement.

THE UNION TRUST COMPANY OF PITTSBURGH, in pursuance of a resolution duly adopted by its Board of Directors, doth hereby constitute and appoint JOHN A. IRWIN to be its attorney, for it and in its name, and as and for its corporate act and deed to acknowledge this agreement before any person having authority by the laws of the Commonwealth of Pennsylvania to

take such acknowledgment, to the intent that the same may be duly recorded.

WITNESS the due execution hereof the day and year aforesaid.

(Sgd.) ANDREW W. MELLON (SEAL)
(Sgd.) RICHARD B. MELLON (SEAL)

ATTEST:
(Sgd.) DEWALDT J. HICKS
(Sgd.) DEWALDT J. HICKS

THE UNION TRUST COMPANY OF PITTSBURGH,
Liquidating Agent.
By (Sgd.) H. C. MCELDOWNEY,
President.

ATTEST:
(Sgd.) JNO. A. IRWIN,
Secretary.

State of Pennsylvania,
County of Allegheny. } ss.:

On the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared ANDREW W. MELLON and RICHARD B. MELLON, who in due form of law acknowledged the foregoing agreement to be their act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DEWALDT J. HICKS,
Notary Public,
(N. P. SEAL).

My Commission expires: Feb. 21st, 1923.

State of Pennsylvania, }
County of Allegheny. } ss.:

I HEREBY CERTIFY, that on the 31st day of January, A. D. 1921, before me, the subscriber, a Notary Public in and for said County and State, personally appeared JOHN A. IRWIN, the attorney named in the foregoing agreement, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said agreement to be the act and deed of the said The Union Trust Company of Pittsburgh.

WITNESS my hand and Notarial seal the day and year aforesaid.

(Sgd.) DE WALDT J. HICKS,
Notary Public.

My Commission expires: February 21st, 1923.

Commonwealth of Pennsylvania, }
County of Westmoreland. } ss.:

(SEAL)

Recorded on this 8th day of June, A. D. 1923, in the Recorder's Office of said County in Deed Book, Vol. 718, page 531.

Given under my Hand and the Seal of the said Office the day and year aforesaid.

(Sgd.) HARRY S. MILLER,
Recorder.

EXHIBIT "E"

Net income for 1920 as shown by Commissioner's letter dated February 21, 1927...	$1,000,459.28

Less: Income erroneously included as taxable by Commissioner:		
A. Overholt & Co.	$281,779.95	
West Overton Distilling Co.	52,814.28	334,594.23
Correct net income		$ 665,865.05
Not subject to normal tax as credits exceed the net income.		
Surtax on $500,000.00 graduated	$263,510.00	
on $165,865.05 @ 64%	106,153.63	
	$369,663.63	
Less tax paid at source	1,942.49	
Correct tax liability	$367,721.14	
Tax paid:		
With return	$406,673.28	
Additional tax	175,259.70	$581,932.98
Overpaid	$214,211.84	
Barred by statute of limitations	38,952.14	
Tax refundable	$175,259.70	
Interest paid	12,527.47	
Amount of plaintiff's claim	$187.787.17	

Suggestion of Death and Motion for Substitution of Executors.

No. 6979 Law.

(Filed Mar. 21, 1934.)

To the Honorable the Judges of said Court:

And Now, this 21st day of March, 1934, come Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, deceased, by their counsel, Smith, Shaw, McClay and Seifert, Esqs., and suggest to your Honorable Court that the plaintiff in the above entitled action, R. B. Mellon, died December 1, 1933; that Letters Testamentary in the Estate of said R. B. Mellon were duly granted to them by the Register of Wills of Allegheny County, Pa., on the 8th day of December, 1933, as appears by short certificate hereto attached; and that at the time of the death of said R. B. Mellon the above entitled action by him against D. B. Heiner, individually and as Collector of Internal Revenue for the 23rd District of Pennsylvania, was pending in this court.

Wherefore the said Executors of the Estate of R. B. Mellon, deceased, respectfully move your Honorable Court that they may be substituted as plaintiffs in the above entitled action in place of said R. B. Mellon.

William A. Seifert,
Smith, Shaw, McClay & Seifert,
Counsel for Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors.

ORDER.

And Now, this 21st day of March, 1934, the foregoing suggestion of death and motion for substitution having been duly presented in open court, upon consideration thereof it is ordered, adjudged and decreed that Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, deceased, be and hereby they are substituted as plaintiffs in the above entitled action in lieu of plaintiff R. B. Mellon, deceased.

By the Court,
Gibson,
Judge.

Commonwealth of Pennsylvania,
Allegheny County. } ss.:

No. 4362

I, Joseph N. Mackrell, Register for the Probate of Wills and Granting Letters of Administration in and for the County aforesaid, Do Hereby Certify That, at Pittsburgh on the 8th day of December, in the year of our Lord one thousand nine hundred and Thirty-three, Letters Testamentary on the estate of Richard B. Mellon, late of Pittsburgh in said County, deceased, were duly granted unto Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, who took and subscribed

the oath of office prescribed by law; and that said Letters Testamentary continue in full force and effect.

THEREFORE, all faith and credit are of right due and ought to be paid to all their lawful acts as such Executor throughout the United States and elsewhere.

Given under my hand and seal of office, at Pittsburgh, this 10th day of February in the year of our Lord one thousand nine hundred and thirty-four.

JOSEPH N. MACKRELL,
(SEAL) *Register.*

Notice of Application to File Amended Affidavit of Defense.

No. 6980 Law.

To: A. W. MELLON,

and/or his attorneys,

SMITH, SHAW, MCCLAY and SEIFERT,
747 Union Trust Building:

You, and each of you, will please take notice that at the opening of court on Monday, October 22, 1934, or as soon thereafter as the matter can be heard, the defendant, by his attorneys, will move the court for permission to file the attached Amended Affidavit of

Defense in this cause and for an order that it be considered as the Affidavit of Defense herein.

HORATIO S. DUMBAULD,
United States Attorney for the Western District of Pennsylvania.
D. LLOYD CLAYCOMB,
Assistant United State Attorney,
Attorneys for the Defendant.

Application for Leave to File Amended Affidavit of Defense.

No. 6980 Law.

Comes now D. B. Heiner, defendant above named, by his attorneys, and respectfully moves the Court for permission to file in this cause the attached Amended Affidavit of Defense.

Respectfully submitted,

HORATIO S. DUMBAULD,
United States Attorney for the Western District of Pennsylvania.

D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

ORDER.

This matter coming on to be heard this 22nd day of October, 1934, it is ordered that the attached Amend-

ed Affidavit of Defense be filed in this cause and be considered as the Affidavit of Defense herein.

PER CURIAM,

G.

Amended Affidavit of Defense.

No. 6980 Law.

(Filed Oct. 15, 1934.)

Comes now D. B. Heiner, defendant above named, and alleges that he has just, true and legal defenses to the allegations contained in the Statement of Claim. The nature of the defenses is as follows:

FIRST DEFENSE

1. The allegations contained in Paragraph "1" of the Statement of Claim are admitted.

2. The allegations contained in Paragraph "2" of the Statement of Claim are admitted.

3. The allegations contained in Paragraph "3" of the Statement of Claim are admitted.

4. The allegations contained in Paragraph "4" of the Statement of Claim are admitted, except that the payment therein alleged to have been made on June 15, 1921, was in fact made on June 17, 1921; the payment therein alleged to have been made on September 15, 1921, was in fact made on September 19, 1921; and the payment therein alleged to have been made on December 15, 1921, was in fact made on December 17,

1921, and the credit therein alleged to have been made on September 15, 1921, was in fact made on May 17, 1922.

5. The allegations contained in Paragraph "5" of the Statement of Claim are admitted.

6. The allegations contained in Paragraph "6" of the Statement of Claim are admitted.

7. The allegations contained in Paragraph "7" of the Statement of Claim are admitted, except that the payment therein described was made on April 2, 1927, and not on April 1, 1927.

8. In answer to the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that for the reasons stated in the Statement of Claim, or for any other reasons, the plaintiff was not subject to or liable for any additional tax for the year 1920. On the contrary, defendant alleges that the additional taxes and interest described in Paragraph "7" of the Statement of Claim were just, due and owing to the United States, and correctly assessed and collected.

Further answering the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that the plaintiff had in fact overpaid his tax by the amount of $27,066.55 for said year, and, on the contrary, alleges that no overpayment whatsoever was made by the plaintiff of his tax for the said year 1920.

9. The allegations contained in Paragraph "9" of the Statement of Claim are admitted.

10. In answer to the allegations contained in Paragraph "10" of the Statement of Claim, defendant admits that Henry C. Frick died on or about December 2, 1919. Defendant further admits that no new formal partnership agreements in writing were entered into between the plaintiff and Richard B. Mellon, or between said parties and the personal representatives of Henry C. Frick.

Further answering the allegations contained in Paragraph "10" of the Statement of Claim, defendant avers and alleges that the two partnerships of "A. Overholt & Company" and "West Overton Distilling Company" were not terminated by the death of Henry C. Frick, but continued in existence until the winding up of their affairs was completed subsequent to the year 1920. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "10" of the Statement of Claim are denied.

11. In answer to the allegations contained in Paragraph "11" of the Statement of Claim, defendant denies that plaintiff and Richard B. Mellon began the liquidation of the two partnerships immediately after December 2, 1919, and denies that during the period from December 2, 1919, until January 31, 1921, the plaintiff and Richard B. Mellon acted in respect of the assets and businesses of said partnerships as liquidating trustees. On the contrary, defendant alleges that throughout the year 1920, the businesses of the aforesaid two partnerships were actively carried on and continued in the ordinary and usual manner.

Further answering the allegations contained in Paragraph "11" of the Statement of Claim, defendant admits the making of the two agreements, copies of which are attached to the Statement of Claim as Exhibits "C" and "D", respectively, but denies the materiality thereof to any issue involved in this suit.

12. In answer to the allegations contained in Paragraph "12" of the Statement of Claim, defendant denies the allegations contained therein, and alleges that the books and records in respect to the business and activities of said partnerships and each of them for the year 1920, which is the only year material to this suit, were kept by the accrual method of accounting.

13. In answer to the allegations contained in Paragraph "13" of the Statement of Claim, defendant admits that in the year 1925 the property and assets then owned by said two partnerships were distributed to the plaintiff, and Richard B. Mellon and the estate of Henry C. Frick. Except as hereinabove admitted, defendant denies the allegations in said paragraph contained.

14. In answer to the allegations contained in Paragraph "14" of the Statement of Claim, defendant admits that during the period from December 2, 1919, to and including the year 1925 neither the plaintiff, his brother Richard B. Mellon, nor the Union Trust Company of Pittsburgh engaged in the business of distilling spirituous liquors, and admits that all sales of spirituous liquors made by or on behalf of the said

partnerships of A. Overholt & Company and West Overton Distilling Company during said period were made in compliance with the existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "14" of the Statement of Claim are denied.

15. Defendant denies the allegations contained in Paragraph "15" of the Statement of Claim and alleges that during the period from December 2, 1919, to and including December 31, 1920, there were no debts and/or contingent liabilities of substantial amount outstanding against the partnerships of A. Overholt & Company and West Overton Distilling Company, or either of them. Defendant further alleges that distributions of assets of said partnerships could have been made during said period.

16. In answer to the allegations contained in Paragraph "16" of the Statement of Claim, defendant admits that during the period from December 2, 1919, to and including December 31, 1920, the assets of the partnerships of A. Overholt & Company and West Overton Distilling Company, including cash, were kept separately and were not commingled with the assets or cash of the plaintiff and/or Richard B. Mellon. Except as hereinbefore admitted, the allegations contained in Paragraph "16" of the Statement of Claim are denied.

17. In answer to the allegations contained in Paragraph "17" of the Statement of Claim, defend-

ant alleges that said allegations are irrelevant and immaterial to any issue of law or fact involved in this proceeding and constitute an attempt to inject into the proceeding impertinent matters; therefore, defendant neither admits nor denies the same. Defendant further alleges that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal income tax liability of the estate of Henry C. Frick for the years 1920 and 1925 or for any year neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or upon his behalf.

18. In answer to the allegations contained in Paragraph "18" of the Statement of Claim, defendant admits that in his return for the year 1920 the plaintiff included the sum of $48,350.74 as income from the partnership of A. Overholt & Company, and included the sum of $5,960.55 as income from the partnership of West Overton Distilling Company. Defendant denies that any part of the said sums should not have been included as taxable income in plaintiff's return for the year 1920, and on the contrary alleges that the entire income of the partnerships of A. Overholt & Company and West Overton Distilling Company for the year 1920 was taxable to the plaintiff and to the parties interested in said partnerships, as provided in Section 218 of the Revenue Act of 1918. Defendant denies that said sums, or either of them, were "so-called liquidating profits", and on the contrary alleges that said sums were part of the operating income earned by said partnerships in the ordinary course of

business. Defendant denies that no part of said sums was received by plaintiff until the year 1925, and denies that no part thereof was available to or subject to plaintiff's demand, and on the contrary alleges that said sums were either received by the plaintiff during the year 1920, or were in all respects the property of the plaintiff available to him and subject to his disp[illegible]n during said year. Defendant denies that no pa[illegible]f the profits from the liquidation of said partnerships was received by plaintiff until the year 1925, and denies that no part thereof was available to or subject to plaintiff's demand, and on the contrary alleges that a substantial part of said profits was either received by plaintiff prior to said year or was in all respects the property of the plaintiff and available to him and subject to his disposition prior to said year. Defendant denies that said partnerships were in process of liquidation in the year 1920, and on the contrary alleges that the businesses of said partnerships were carried on in the ordinary and usual manner throughout said year of 1920. Defendant denies that the income from said partnerships was not taxable until the liquidating payments to the plaintiff exceeded the cost value of his interest in the partnership assets as of December 2, 1919, and on the contrary, alleges that said partnerships were required to file partnership returns for the year 1920 in accordance with the provisions of Section 224 of the Revenue Act of 1918, and under the provisions of Section 218 of the said Revenue Act of 1918, plaintiff's distributive share of the net income of each of said part-

nerships for the year 1920 represented taxable income to him for said year. Defendant denies that payments received by plaintiff from said partnerships prior to the year 1925 did not exceed the cost to him or the cost value of his interest in the partnership assets as of December 2, 1919, and on the contrary alleges that the payments received by the plaintiff prior to the year 1925 from each of the aforesaid partnerships exceeded the cost to him of his interest in the partnership assets.

19. In answer to the allegations contained in Paragraph "19" of the Statement of Claim, the defendant admits that the Commissioner increased plaintiff's share of the net income of A. Overholt & Company for the year 1920 from $48,350.74 to $281,779.95, and increased plaintiff's share of the net income of West Overton Distilling Company for the year 1920 from $5,960.55 as reported on the return to $52,814.28. Further answering, defendant alleges that the aforesaid amounts of $281,779.95 and $52,814.28, respectively, were plaintiff's distributive shares of the net income earned by each of said partnerships during the year 1920 in the ordinary course of business and were computed by the Commissioner on the basis of the partnership returns and the books and records of said partnerships for the year 1920, as shown below:

A. Overholt & Company

Gross Income

Whiskey sales, not less than ..	$ 928,273.71

Less: January 1, 1920 whiskey inventory	$794,235.38	
December 31, 1920 whiskey inventory	697,307.34	96,928.04
Gross profit on whiskey sales		831,345.67
Sales of empty barrels, not less than		6,609.31
Charges for bottling and casing, not less than		320,533.61
Storage charges, not less than		42,550.50
Other operating income not allocated		33,578.67
Interest received		3,480.73
Rents received		300.00
Total		$1,238,398.49
Deductions		
Salaries and wages	39,600.01	
Insurance	18,190.00	
Taxes	31,132.86	
Storage expense	23,446.60	
Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office	3,519.59	
Cases, bottles, corks, other supplies and misc.	166,749.49	
Loss on Liberty Bonds	5,328.75	
Total		393,058.63
Net income		$ 845,339.86

's one-third distribu-		
are		281,779.95
West Overton Distilling Company		
Gross Income		
s returns		$ 218,050.31
ventory December 1,		
9	$121,135.00	
ventory December 31,		
0	93,819.44	27,315.56
.....		$ 190,734.75
Deductions		
.....	$ 8,188.92	
.....	2,236.44	
ion	1,739.49	
Liberty Bonds	507.50	
.....	1,211.40	
e	5,528.16	
penses—Bad debts,		
.....	11,650.00	
's commissions	1,230.00	
.....		32,291.91
ne		$ 158,442.84
s one-third distribu-		
are		$ 52,814.28

In answer to the allegations contained in h "20" of the Statement of Claim, defendant at said allegations are immaterial and irrele- ny issue of law or fact involved in this pro-

ceeding, and, therefore, defendant neither admits nor denies the same. Defendant further alleges that any action taken by the plaintiff on or in connection with his income tax returns for the years 1921 to 1925, inclusive, cannot operate to preclude correct action as to the issues herein involved. Defendant further alleges that the plaintiff was taxable on his distributive share of the income of said partnerships, whether distributed or not.

21. In answer to the allegations contained in Paragraph "21" of the Statement of Claim, defendant alleges that it is entirely immaterial and irrelevant to any issue of fact or law involved in this action whether the Commissioner of Internal Revenue did or did not eliminate any profit or loss reported by plaintiff on his income tax return for the year 1924. Any action taken by the Commissioner in respect of said return neither operates to preclude correct action as to the issues herein involved nor as admissions against interest by this defendant or on his behalf. Further answering the allegations contained in Paragraph "21" of the Statement of Claim, the defendant alleges that the Commissioner's final audit of the plaintiff's income tax return for the year 1924 showed an overassessment for said year in the amount of $16,982.12, and alleges that in determining said overassessment, the Commissioner did not eliminate from plaintiff's income tax return an amount of $8,202.09 reported thereon as plaintiff's distributive share of the income of "A. Overholt & Co.", and did not eliminate therefrom an amount of

$7,644.40 deducted on said return as plaintiff's proportionate share of an operating loss sustained by the "West Overton Dist. Co.", during the said year.

22. In answer to the allegations contained in Paragraph "22" of the Statement of Claim, defendant alleges that any action which the Commissioner of Internal Revenue may have taken in determining the profit realized by the plaintiff in the year 1925 on the liquidation of the partnerships of A. Overholt & Company and West Overton Distilling Company is immaterial and irrelevant to any issue involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Further answering the allegations contained in Paragraph "22" of the Statement of Claim, defendant denies that the amount actually received by the plaintiff in the year 1925 in liquidation of his investment in said partnerships included the profits and losses of the partnerships for all or any prior years.

23. In answer to the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that it is entirely immaterial to any issue of fact or law involved in this proceeding what course the Commissioner of Internal Revenue may have taken in regard to the determination of a deficiency in income tax for the year 1925 against the plaintiff and as to the assessment or collection thereof. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf.

Further answering the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that on or about June 13, 1932, within the time provided by law, the plaintiff, A. W. Mellon, filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania at Pittsburgh, Pennsylvania, a claim for refund of income tax for the year 1925, claiming a refund of the full amount of the sum of $48,906.45 assessed and collected as a deficiency for said year, and alleges that said claim for refund is based in part on the alleged inclusion in income for the year 1925 of the operating net income of the aforesaid partnerships for the year 1920, and that said claim for refund for 1925 is pending undisposed of by the Commissioner of Internal Revenue.

24. In answer to the allegations of fact or law, if any, contained in Paragraph "24" of the Statement of Claim, the defendant denies the same. Defendant alleges, however, that any action taken by the Commissioner of Internal Revenue other than for the year 1920 is immaterial and irrelevant to any issue of fact or law involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by the defendant or on his behalf. Defendant further alleges that by reason of the pendency of the claim for refund for the year 1925, final action has not been taken by the Commissioner of Internal Revenue in regard to said year. Defendant further alleges that the Commissioner of Internal Revenue by his action in assessing and collecting the taxes involved in this ac-

tion and by his rejection of the claim for refund for the year 1920, as hereinafter alleged, has duly determined that during the year 1920 the partnerships of A. Overholt & Company and West Overton Distilling Company realized and received income taxable, whether distributed or not, to the plaintiff and the other parties interested therein. Defendant further alleges that in letters dated April 16, 1932, February 27, 1934, and April 6, 1934, to plaintiff, the Commissioner held that plaintiff's distributive share of the net income for the year 1920 of the partnerships of A. Overholt & Company and West Overton Distilling Company was "properly reportable on your 1920 return."

25. In answer to the allegations contained in Paragraph "25" of the Statement of Claim, defendant admits that on or about March 19, 1929, plaintiff filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose, a claim for refund of $194,160.75, for the year 1920. Defendant denies the remaining allegations in said Paragraph "25", and alleges that in said refund claim plaintiff assigned the following reasons for the allowance thereof:

> In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $281,779.95 and $52,814.28, respectively, and assessed and collected

additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added or subtracted from the partners' individual incomes for those years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

26. In answer to the allegations contained in Paragraph "26" of the Statement of Claim, defendant admits that the allegations therein contained were true at the time of the filing of the praecipe for summons in the instant cause on March 23, 1932. Defendant alleges, however, that by letter dated April 16, 1932, the Commissioner of Internal Revenue advised the plaintiff that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of the above mentioned partnerships was reportable in the year in which the income was realized. Said letter dated April 16, 1932, further advised the plaintiff that he would be afforded a hearing in the Income Tax Unit at Washington upon

written request therefor. Plaintiff through counsel was afforded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter, by letter dated February 27, 1934, plaintiff was advised of the Commissioner's determination with respect to his aforesaid claim for refund for the year 1920 as follows:

> Your claim for refund of $194,160.75, income taxes for the taxable year 1920, has been examined.
>
> Your claim is based on the statement that amounts of $281,779.95 and $52,814.28 were included in taxable income representing operating profits of A. Overholt and Company and the West Overton Distilling Company, respectively, and that since the partnerships were in liquidation the profits were not reportable until the year 1925 when final liquidation occurred.
>
> Careful consideration has been accorded the information submitted in the brief dated October 11, 1932 and at the conference held in Washington, D. C., October 12, 1932 and this office holds that your proportionate share of the operating profits of the above-mentioned partnerships was properly reportable on your 1920 return.
>
> Accordingly, the claim will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932 official notice of the disallowance of the claim will be issued by registered mail.
>
> A copy of this letter is being forwarded to your representative, Mr. William A. Seifert, in accordance with the authority conferred upon him in your power of attorney on file with the Bureau.

Plaintiff's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was sent by registered mail under date of April 6, 1934.

27. In answer to the allegations contained in Paragraph "27" of the Statement of Claim, defendant denies that the said additional tax of $190,419.70, and the interest thereon of $12,082.52, was not due and owing to the Government of the United States, and, on the contrary, alleges that said tax and said interest were due and owing and were justly collected. Further answering the allegations contained in Paragraph "27" of the Statement of Claim, defendant denies that plaintiff overstated his taxable income in his return, and denies that he overpaid his tax on the basis of said return. On the contrary, defendant alleges that said income was understated on the return, and that all payments made on said tax were due and owing to the United States, and were justly and correctly paid. Further answering the allegations contained in Paragraph "27", defendant denies that the income from the said two partnerships, during the year 1920, was not taxable in that year, and, on the contrary, alleges that it was subject to income tax and that the taxes heretofore assessed and collected thereon and in controversy in this action, were in all respects justly and correctly assessed and collected. Further answering the allegations contained in Paragraph "27", de-

fendant denies that the said income was erroneously reported on the return, erroneously increased, and/or erroneously included as taxable income by the Commissioner. On the contrary, defendant alleges that the said income was reported in part on the return, the correct increases were made by the Commissioner of Internal Revenue, and both the original amount reported and the amount of increase were justly and correctly included as taxable income by the Commissioner.

28. In answer to the allegations contained in Paragraph "28" of the Statement of Claim, defendant admits that the Commissioner of Internal Revenue has included in plaintiff's income for the year 1920 the sums of $281,779.95 and $52,814.28. Defendant denies, however, that said sums were liquidating profits of A. Overholt & Company and West Overton Distilling Company, but, on the contrary, alleges that said sums represent plaintiff's one-third distributive share of the operating income and profits of the aforesaid partnerships of A. Overholt & Company and West 1920. Defendant alleges, however, that any action Overton Distilling Company, respectively, for the year taken by the Commissioner of Internal Revenue with respect to plaintiff's income tax liability for the year 1925 is wholly immaterial and irrelevant to any issue involved in this proceeding, and any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Defendant further alleges that the Commissioner of Internal Rev-

enue has not taken final action with respect to plaintiff's income tax liability for the year 1925. Defendant admits that the Commissioner of Internal Revenue assessed and defendant collected the tax for the year 1920 based upon a net income which included the aforesaid sums of $281,779.95 and $52,814.28. Defendant alleges, however, that the Commissioner of Internal Revenue has not taken final action with respect to plaintiff's income tax liability for the year 1925, and that if tax has been collected on the same income for each of the years 1920 and 1925, proper adjustment can be made by action on plaintiff's refund claim for the year 1925.

29. In answer to the allegations contained in Paragraph "29" of the Statement of Claim, defendant denies that the computation set forth in Exhibit "E" attached to the Statement of Claim is a correct computation of plaintiff's income tax liability for the year 1920, and denies that plaintiff overpaid his income tax for said year. On the contrary, defendant alleges that the plaintiff's income tax liability for the year 1920 was correctly determined by the Commissioner of Internal Revenue, and that said taxes and the interest thereon were duly and legally assessed by the Commissioner of Internal Revenue and collected by the defendant.

30. In answer to the allegations contained in Paragraph "30" of the Statement of Claim, defendant denies that he is indebted to the plaintiff in the sum of $202,502.22 with interest thereon from April 1, 1927,

provided by law, and defendant denies that he is debted to the plaintiff in any sum whatsoever. Defendant owes plaintiff nothing.

NEW MATTER.

Second Defense.

For a further and second defense to plaintiff's atement of Claim, the defendant, although fully relyg on the defenses hereinabove set forth, alleges that e plaintiff is estopped to assert and claim that any rtion of the income on which the taxes in controrsy in this action were assessed was income from operty held in trust, and is further estopped to assert d claim that such income was not distributed or disbutable to the plaintiff if such a trust or trusts exed, and as such not taxable to plaintiff, in that:

1. On or about March 15, 1921, plaintiff and his other, Richard B. Mellon, caused to be filed with e Collector of Internal Revenue for the Twenty-ird District of Pennsylvania a partnership return income for the calendar year 1920 in the name of d for A. Overholt & Company on official form 1065, e form provided by the Commissioner of Internal venue for the making of partnership returns of inme. Plaintiff therein claimed and represented that Overholt & Company was a partnership and that e income thereof for the year 1920 was distributable d taxable, one-third each, to the plaintiff, Andrew Mellon, his brother, Richard B. Mellon, and the ese of Henry C. Frick.

2. Neither Richard B. Mellon nor the plaintiff, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Company on the form prescribed for the making of returns by fiduciaries of a trust.

3. In examining the partnership return filed in the name of and for A. Overholt & Company and the income tax return filed by the plaintiff for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of A. Overholt & Company, and merely changed the amount of the income so reported.

4. Plaintiff first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of plaintiff's claim for refund for the year 1920, and more than six years after March 15, 1921.

5. On or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for said West Overton Distilling Company on official form 1065, the form prescribed by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and represented that West Overton Distilling Company was a partnership and that the income thereof for the year

920 was distributable and taxable, one-third each, to
e plaintiff, Andrew W. Mellon, his brother, Richard
. Mellon, and the estate of Henry C. Frick.

6. Neither Andrew W. Mellon nor Richard B.
ellon, nor both acting jointly, filed or caused to be
ed an income tax return for the year 1920, covering
ıy portion of the income of West Overton Distilling
ompany on the form prescribed for the making of
turns for fiduciaries of a trust.

7. In examining the partnership return filed in
e name of and for West Overton Distilling Company
ıd the income tax return filed by the plaintiff for
920, the Commissioner of Internal Revenue accepted
e manner and method of reporting the 1920 income
West Overton Distilling Company, and merely
ıanged the amount of the income so reported.

8. Plaintiff first asserted and claimed that said
come should be treated as the income of a taxable
ust long after the filing of plaintiff's claim for re-
ınd for the year 1920, and more than six years after
arch 15, 1921.

9. If the income of A. Overholt & Company for
e calendar year 1920 had been treated and reported
plaintiff and his brother, Richard B. Mellon, as the
come of a taxable trust, the correct tax liability, ex-
ısive of interest as provided by law, would have been
51,914.70, computed as follows:

Net income as determined by the Commissioner, as set forth in Para. 19 hereof		$845,339.86
Less: Exemption		1,000.00
Income subject to normal tax		$844,339.86
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $840,339.86	67,227.19	
Surtax on $845,339.86	484,527.51	
Total tax liability		$551,914.70

10. If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by plaintiff and his brother, Richard B. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been $66,673.42, computed as follows:

Net income determined by the Commissioner, as set forth in Para. 19 hereof		$158,442.84
Less: Exemption		1,000.00
Income subject to normal tax		$157,442.84
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $153,442.84	12,275.43	
Surtax on $158,442.84	54,237.99	
Total tax liability		$66,673.42

11. The defendant, the Commissioner of Inter- Revenue, and the United States relied to their prej- ce on plaintiff's original position and representa- in respect of the manner and method of reporting income for the calendar year 1920 of A. Overholt ompany and the West Overton Distilling Company, if said organizations were taxable trusts, as now tended by plaintiff, the Commissioner of Internal venue and the United States are now precluded from essing and collecting the aforesaid tax liabilities for 0 o $551,914.70 and $66,673.42, and plaintiff is es- ped to assert and claim that any portion of the in- e on which the taxes in controversy in this action e assessed was not taxable to him while receiving benefit resulting from the inability of the United tes to collect the said tax liabilities.

12. By reason of the facts aforesaid, plaintiff is pped to assert and claim that any portion of the me of A. Overholt & Company and West Overton tilling Company, or either of them, was income n property held in trust, and is further estopped assert and claim that such income was not dis- uted or distributable to the plaintiff if such a trust rusts existed, or that said income should be treated he income of taxable trusts, and or that plaintiff ot indebted to defendant in any amount on account ncome taxes for the year 1920.

NEW MATTER.

THIRD DEFENSE.

For a further and separate defense to plaintiff's tement of Claim, although fully relying upon and

reserving to himself the defenses hereinabove set forth, and without waiving the same, or any part thereof, the defendant alleges that the plaintiff ought not to recover of and from the defendant in this cause, in that:

1. At the time the additional tax for the year 1920 here in controversy was determined, assessed and paid, plaintiff was indebted to the United States in an amount equal to or in excess of the tax and interest so paid by plaintiff, even though the income on which the taxes in controversy was asserted be taxable under the provisions of law relating to trusts as income of taxable trusts.

2. If the income of A. Overholt & Company for the calendar year of 1920 had been treated by plaintiff and his brother, Richard B. Mellon, and/or the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been $551,914.70, computed as hereinabove alleged.

3. If the income of West Overton Distilling Company for the calendar year 1920 had been treated by plaintiff and his brother, Richard B. Mellon, and/or by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been $66,673.42, computed as hereinabove alleged.

4. Plaintiff and his brother, Richard B. Mellon, did not file returns as trustees of any such trust or

trusts, and have paid no Federal income tax as trustees of any such trust or trusts for the year 1920.

5. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Company were distributed to the plaintiff, his brother, Richard B. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of $551,914.70 could have been collected.

6. The amount of money, together with the value of property so received by plaintiff in distribution, was equal to or in excess of the aforesaid tax liability of $551,914.70, plus interest as provided by law.

7. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to the plaintiff, his brother, Richard B. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of $66,673.42 could have been collected.

8. The amount of money, together with the value of property so received by plaintiff in distribution, was equal to or in excess of the aforesaid tax liability of $66,673.42, plus interest as provided by law.

9. At the time the additional tax for the year 1920 here in controversy was determined, asserted and collected, plaintiff was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Company and West Overton Distilling

Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $202,502.22 collected by the defendant from the plaintiff as alleged in plaintiff's statement of claim.

10. By reason of the facts aforesaid, the above amount of $202,502.22 collected by the defendant from the plaintiff as alleged in plaintiff's Statement of Claim, was justly owing to the United States by the plaintiff, even though the income for the year 1920 from the property of A. Overholt & Company and West Overton Distilling Company should have been treated under the provisions of law relating to trusts as income of taxable trusts.

WHEREFORE, defendant having fully answered, demands that he have judgment in his favor for his costs in this behalf expended, and for such other and further relief as may be just and proper.

D. B. HEINER,
D. B. HEINER,
Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania,
Defendant.

HORATIO S. DUMBAULD,
HORATIO S. DUMBAULD,
United States Attorney.
D. LLOYD CLAYCOMB,
D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

Notice of Application to File Amended Affidavit of Defense.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said County and Commonwealth, personally appeared D. B. HEINER, who, being duly sworn according to law, deposes and says that he has read the foregoing amended affidavit of defense and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

D. B. HEINER.

Subscribed and sworn to before me this 18th day of October, 1934.

FRANK J. ATKINS,
(SEAL) *Notary Public.*
My Commission expires March 2, 1937.

Notice of Application to File Amended Affidavit of Defense.

No. 6979 Law.

To: JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE and THE UNION TRUST COMPANY OF PITTSBURGH,
Executors of the Estate of R. B. Mellon, Deceased,
and/or their attorneys:
SMITH, SHAW, MCCLAY AND SEIFERT,
747 Union Trust Building,
Pittsburgh, Pennsylvania:

You, and each of you, will please take notice that at the opening of court on Monday, October 22, 1934,

or as soon thereafter as the matter can be heard, the defendant, by his attorneys, will move the court for permission to file the attached Amended Affidavit of Defense in this cause and for an order that it be considered as the Affidavit of Defense herein.

HORATIO S. DUMBAULD,
United States Attorney for the Western District of Pennsylvania.

D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

Application for Leave to File Amended Affidavit of Defense.

No. 6979 Law.

Comes now D. B. Heiner, defendant above named, by his attorneys, and respectfully moves the Court for permission to file in this cause the attached Amended Affidavit of Defense.

Respectfully submitted,

HORATIO S. DUMBAULD,
United States Attorney for the Western District of Pennsylvania.
D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

ORDER.

This matter coming on to be heard this 22nd day of October, 1934, it is ordered that the attached Amended Affidavit of Defense be filed in this cause and be considered as the Affidavit of Defense herein.

PER CURIAM,

G.

Amended Affidavit of Defense.

No. 6979 Law.

(Filed Oct. 22, 1934.)

Comes now D. B. Heiner, defendant above named, and alleges that he has just, true and legal defenses to the allegations contained in the Statement of Claim. The nature of the defenses is as follows:

FIRST DEFENSE.

1. Defendant admits that at the time of filing the Statement of Claim the then plaintiff, R. B. Mellon, resided in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof, but alleges that the said R. B. Mellon died testate on or about December 1, 1933, and that the duty qualified executors and executrices of his estate are Jennie King Mellon, Richard King Mellon and Sarah Mellon Scaife, all residents of Pittsburgh, Pennsylvania, and the Union Trust Company of Pittsburgh, a corporation doing business in Pittsburgh, Pennsylvania.

2. The allegations of Paragraph "2" of the Statement of Claim are admitted.

3. The allegations contained in Paragraph "3" of the Statement of Claim are admitted.

4. The allegations contained in Paragraph "4" of the Statement of Claim are admitted, except that the payment therein alleged to have been made on June 15, 1921, was in fact made on June 17, 1921; the payment therein alleged to have been made on September 15, 1921, was in fact made on September 19, 1921; and the payment therein alleged to have been made on December 15, 1921, was in fact made on December 17, 1921.

5. The allegations contained in Paragraph "5" of the Statement of Claim are admitted.

6. The allegations contained in Paragraph "6" of the Statement of Claim are admitted.

7. The allegations contained in Paragraph "7" of the Statement of Claim are admitted.

8. In answer to the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that for the reasons stated in the Statement of Claim, or for any other reasons, the said R. B. Mellon was not subject to or liable for any additional tax for the year 1920. On the contrary, defendant alleges that the additional taxes and interest described in Paragraph "7" of the Statement of Claim were just, due and owing to the United States, and correctly assessed and collected.

Further answering the allegations contained in Paragraph "8" of the Statement of Claim, defendant denies that the said R. B. Mellon had in fact overpaid his tax by the amount of $38,952.14 for said year, and, on the contrary, alleges that no overpayment whatsoever was made by him of his tax for the said year 1920.

9. The allegations contained in Paragraph "9" of the Statement of Claim are admitted.

10. In answer to the allegations contained in Paragraph "10" of the Statement of Claim, defendant admits that Henry C. Frick died on or about December 2, 1919. Defendant further admits that no new formal partnership agreements in writing were entered into between said R. B. Mellon and Andrew W. Mellon, or between said parties and the personal representatives of Henry C. Frick.

Further answering the allegations contained in Paragraph "10" of the Statement of Claim, defendant avers and alleges that the two partnerships of "A. Overholt & Company" and "West Overton Distilling Company" were not terminated by the death of Henry C. Frick, but continued in existence until the winding up of their affairs was completed subsequent to the year 1920. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "10" of the Statement of Claim are denied.

11. In answer to the allegations contained in Paragraph "11" of the Statement of Claim, defendant denies that said R. B. Mellon and Andrew W. Mellon

began the liquidation of the two partnerships immediately after December 2, 1919, and denies that during the period from December 2, 1919, until January 31, 1921, said R. B. Mellon and Andrew W. Mellon acted in respect of the assets and businesses of said partnerships as liquidating trustees. On the contrary, defendant alleges that throughout the year 1920, the businesses of the aforesaid two partnerships were actively carried on and continued in the ordinary and usual manner.

Further answering the allegations contained in Paragraph "11" of the Statement of Claim, defendant admits the making of the two agreements, copies of which are attached to the Statement of Claim as Exhibits "C" and "D", respectively, but denies the materiality thereof to any issue involved in this suit.

12. In answer to the allegations contained in Paragraph "12" of the Statement of Claim, defendant denies the allegations contained therein, and alleges that the books and records in respect to the business and activities of said partnerships and each of them for the year 1920, which is the only year material to this suit, were kept by the accrual method of accounting.

13. In answer to the allegations contained in Paragraph "13" of the Statement of Claim, defendant admits that in the year 1925 the property and assets then owned by said two partnerships were distributed to said R. B. Mellon and Andrew W. Mellon and the estate of Henry C. Frick. Except as herein above admitted,

defendant denies the allegations in said paragraph contained.

14. In answer to the allegations contained in Paragraph "14" of the Statement of Claim, defendant admits that during the period from December 2, 1919, to and including the year 1925 neither R. B. Mellon, his brother Andrew W. Mellon, nor the Union Trust Company of Pittsburgh engaged in the business of distilling spiritous liquors, and admits that all sales of spiritous liquors made by or on behalf of the said partnerships of A. Overholt & Company and West Overton Distilling Company during said period were made in compliance with the existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors. Except as hereinbefore admitted and qualified the allegations contained in Paragraph "14" of the Statement of Claim are denied.

15. Defendant denies the allegations contained in Paragraph "15" of the Statement of Claim and alleges that during the period from December 2, 1919, to and including December 31, 1920, there were no debts and/or contingent liabilities of substantial amount outstanding against the partnerships of A. Overholt & Company and West Overton Distilling Company, or either of them. Defendant further alleges that distributions of assets of said partnerships could have been made during said period.

16. In answer to the allegations contained in Paragraph "16" of the Statement of Claim, defendant admits that during the period from December 2,

1919, to and including December 31, 1920, the assets of the partnerships of A. Overholt & Company and West Overton Distilling Company, including cash, were kept separately and were not comingled with the assets or cash of R. B. Mellon and/or Andrew W. Mellon. Except as herein before admitted, the allegations contained in Paragraph "16" of the Statement of Claim are denied.

17. In answer to the allegations contained in Paragraph "17" of the Statement of Claim, defendant alleges that said allegations are irrelevant and immaterial to any issue of law or fact involved in this proceeding and constitute an attempt to inject into the proceeding impertinent matters; therefore, defendant neither admits nor denies the same. Defendant further alleges that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal income tax liability of the estate of Henry C. Frick for the years 1920 and 1925 or for any year neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or upon his behalf.

18. In answer to the allegations contained in Paragraph "18" of the Statement of Claim, defendant admits that in his return for the year 1920 R. B. Mellon included the sum of $48,350.74 as income from the partnership of A. Overholt & Company, and included the sum of $5,960.55 as income from the partnership of West Overton Distilling Company. Defendant denies that any part of the said sums should

not have been included as taxable income in R. B. Mellon's return for the year 1920, and on the contrary alleges that the entire income of the partnerships of A. Overholt & Company and West Overton Distilling Company for the year 1920 was taxable to R. B. Mellon and to the parties interested in said partnerships, as provided in Section 218 of the Revenue Act of 1918. Defendant denies that said sums, or either of them, were "so-called liquidating profits", and on the contrary alleges that said sums were part of the operating income earned by said partnerships in the ordinary course of business. Defendant denies that no part of said sums was received by R. B. Mellon until the year 1925, and denies that no part thereof was available to or subject to R. B. Mellon's demand, and on the contrary alleges that said sums were either received by him during the year 1920, or were in all respects his property available to him and subject to his disposition during said year. Defendant denies that no part of the profits from the liquidation of said partnerships was received by R. B. Mellon until the year 1925, and denies that no part thereof was available to or subject to his demand, and on the contrary alleges that a substantial part of said profits was either received by him prior to said year or was in all respects his property and available to him and subject to his disposition prior to said year. Defendant denies that said partnerships were in process of liquidation in the year 1920, and on the contrary alleges that the businesses of said partnerships were carried on in the ordinary and usual manner throughout said year of 1920. Defendant

denies that the income from said partnerships was not taxable until the liquidating payments to R. B. Mellon exceeded the cost value of his interest in the partnerships assets as of December 2, 1919, and on the contrary alleges that said partnerships were required to file partnership returns for the year 1920 in accordance with the provisions of Section 224 of the Revenue Act of 1918, and under the provisions of Section 218 of the said Revenue Act of 1918 plaintiff's distributive share of the net income of each of said partnerships for the year 1920 represented taxable income to him for said year. Defendant denies that payments received by R. B. Mellon from said partnerships prior to the year 1925 did not exceed the cost to him or the cost value of his interest in the partnership assets as of December 2, 1919, and on the contrary alleges that the payments received by R. B. Mellon prior to the year 1925 from each of the aforesaid partnerships exceeded the cost to him of his interest in the partnership assets.

19. In answer to the allegations contained in Paragraph "19" of the Statement of Claim, the defendant admits that the Commissioner increased R. B. Mellon's share of the net income of A. Overholt & Company for the year 1920 from $48,350.74 to $281,779.95, and increased R. B. Mellon's share of the net income of West Overton Distilling Company for the year 1920 from $5,960.55 as reported on the return to $52,814.28. Further answering, defendant alleges that the aforesaid amounts of $281,779.95 and $52,814.28, respectively, were R. B. Mellon's distributive shares of the net

income earned by each of said partnerships during the year 1920 in the ordinary course of business and were computed by the Commissioner on the basis of the partnership returns and the books and records of said partnerships for the year 1920, as shown below:

A. Overholt & Company

Gross Income

Whiskey sales, not less than		$ 928,273.71
Less: January 1, 1920 whiskey inventory	$794,235.38	
December 31, 1920 whiskey inventory	697,307.34	96,928.04
Gross profit on whiskey sales		$ 831,345.67
Sales of empty barrels, not less than		6,609.31
Charges for bottling and casing, not less than		320,533.61
Storage charges, not less than		42,550.50
Other operating income not allocated		33,578.67
Interest received		3,480.73
Rents received		300.00
Total		$1,238,398.49

Deductions

Salaries and wages	$ 39,600.01
Insurance	18,190.00
Taxes	31,132.86
Storage expense	23,446.60

Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office .	3,519.59	
Cases, bottles, corks, other supplies and misc.	166,749.49	
Loss on Liberty Bonds	5,328.75	
Total		393,058.63
Net income		$ 845,339.86
R. B. Mellon's one-third distributive share		$ 281,779.95

West Overton Distilling Company

Gross Income

Sales less returns		$ 218,050.31
Less: Inventory December 31, 1919	$121,135.00	
Inventory December 31, 1920	93,819.44	27,315.56
		$ 190,734.75

Deductions

Labor	$ 8,188.92
Taxes	2,236.44
Depreciation	1,739.49
Loss on Liberty Bonds	507.50
Storage	1,211.40
Insurance	5,528.16

Other expenses—Bad debts, etc.	11,650.00	
Salesmen's commissions	1,230.00	
Total		32,291.91
Net income		$ 158,442.84
R. B. Mellon's one-third distributive share		$ 52,814.28

20. In answer to the allegations contained in Paragraph "20" of the Statement of Claim, defendant alleges that said allegations are immaterial and irrelevant to any issue of law or fact involved in this proceeding, and, therefore, defendant neither admits nor denies the same. Defendant further alleges that any action taken by R. B. Mellon on or in connection with his income tax returns for the years 1921 to 1925, inclusive, cannot operate to preclude correct action as to the issues herein involved. Defendant further alleges that R. B. Mellon was taxable on his distributive share of the income of said partnerships, whether distributed or not.

21. In answer to the allegations contained in Paragraph "21" of the Statement of Claim, defendant alleges that it is entirely immaterial and irrelevant to any issue of fact or law involved in this action whether the Commissioner of Internal Revenue did or did not eliminate any profit or loss reported by R. B. Mellon on his income tax return for the year 1924. Any action taken by the Commissioner in respect of said re-

turn neither operates to preclude correct action as to the issues herein involved nor as admissions against interest by this defendant or on his behalf. Further answering the allegations contained in Paragraph "21" of the Statement of Claim, the defendant alleges that the Commissioner's final audit of R. B. Mellon's income tax return for the year 1924 showed an overassessment for said year in the amount of $14,778.35, and alleges that in determining said overassessment, the Commissioner did not eliminate from R. B. Mellon's income tax return an amount of $8,202.08 reported thereon as R. B. Mellon's distributive share of the income of "A. Overholt & Company, a partnership," and did not eliminate therefrom an amount of $7,644.40 deducted on said return as R. B. Mellon's proportionate share of an operating loss sustained by the "West Overton Distilling Company, a partnership" during the said year.

22. In answer to the allegations contained in Paragraph "22" of the Statement of Claim, defendant alleges that any action which the Commissioner of Internal Revenue may have taken in determining the profit realized by R. B. Mellon in the year 1925 on the liquidation of the partnerships of A. Overholt & Company and West Overton Distilling Company is immaterial and irrelevant to any issue involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Further answering the allegations contained in Para-

graph "22" of the Statement of Claim, defendant denies that the amount actually received by R. B. Mellon in the year 1925 in liquidation of his investment in said partnerships included the profits and losses of the partnerships for all or any prior years.

23. In answer to the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that it is entirely immaterial to any issue of fact or law involved in this proceeding what course the Commissioner of Internal Revenue may have taken in regard to the determination of a deficiency in income tax for the year 1925 against R. B. Mellon and as to the assessment or collection thereof. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf.

Further answering the allegations contained in Paragraph "23" of the Statement of Claim, defendant alleges that on or about May 13, 1932, within the time provided by law, Richard B. Mellon, filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania at Pittsburgh, Pennsylvania, a claim for refund of income tax for the year 1925, claiming a refund of the full amount of the sum of $41,008.84 assessed and collected as a deficiency for said year, and alleges that said claim for refund is based in part on the alleged inclusion in income for the year 1925 of the operating net income of the aforesaid partnerships for the year 1920, and that said claim for refund for 1925 is pending undisposed of by the Commissioner of Internal Revenue.

24. In answer to the allegations of fact or law, if any, contained in Paragraph "24" of the Statement of Claim, the defendant denies the same. Defendant alleges, however, that any action taken by the Commissioner of Internal Revenue other than for the year 1920 is immaterial and irrelevant to any issue of fact or law involved in this proceeding. Any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by the defendant or on his behalf. Defendant further alleges that by reason of the pendency of the claim for refund for the year 1925, final action has not been taken by the Commissioner of Internal Revenue in regard to said year. Defendant further alleges that the Commissioner of Internal Revenue by his action in assessing and collecting the taxes involved in this action and by his rejection of the claim for refund for the year 1920, as hereinafter alleged, has duly determined that during the year 1920 the partnerships of A. Overholt & Company and West Overton Distilling Company realized and received income taxable, whether distributed or not, to R. B. Mellon and the other parties interested therein. Defendant further alleges that in letters dated April 16, 1932, February 27, 1934, and April 6, 1934, to Richard B. Mellon or to the estate of Richard B. Mellon, the Commissioner held that Richard B. Mellon's distributive share of the net income for the year 1920 of the partnerships of A. Overholt & Company and West Overton Distilling Company was "properly reportable in his 1920 return."

25. In answer to the allegations contained in Paragraph "25" of the Statement of Claim, defendant admits that on or about March 19, 1929, R. B. Mellon filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose, a claim for refund of $187,787.17, to-wit, the aforesaid sums of $175,259.70 additional tax and $12,527.47 interest for the year 1920. Defendant denies the remaining allegations in said Paragraph "25", and alleges that in said refund claim R. B. Mellon assigned the following reasons for the allowance thereof.

In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $ 281,779.95 and $52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for those years. Ac-

cordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

26. In answer to the allegations contained in Paragraph "26" of the Statement of Claim, defendant admits that the allegations therein contained were true at the time of the filing of the praecipe for summons in the instant cause on March 23, 1932. Defendant alleges, however, that by letter dated April 16, 1932, the Commissioner of Internal Revenue advised R. B. Mellon that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of the above mentioned partnerships was reportable in the year in which the income was realized. Said letter dated April 16, 1932, further advised R. B. Mellon that he would be afforded a hearing in the Income Tax Unit at Washington upon written request therefor. Said R. B. Mellon through counsel was afforded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter, by letter dated February 27, 1934, R. B. Mellon was advised of the Commissioner's determination with respect to his aforesaid claim for refund for the year 1920 as follows:

> The claim for refund of $187,787.17, income taxes for the year 1920 filed by Mr. R. B. Mellon, has been examined.
>
> The claim is based on the statement that amounts of $281,779.95 and $52,814.28 were includ-

ed in taxable income representing operating profits of A. Overholt and Company and the West Overton Distilling Company, respectively, and that since the partnerships were in liquidation the profits were not reportable until the year 1925 when final liquidation occurred.

Careful consideration has been accorded the information submitted in the brief dated October 11, 1932 and at a conference held in Washington, D. C., October 12, 1932 and this office holds that Mr. Mellon's proportionate share of the operating profits of the above-mentioned partnerships was properly reportable in his 1920 return.

Accordingly, the claim will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932, official notice of the disallowance of the claim will be issued by registered mail.

R. B. Mellon's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was sent by registered mail under date of April 6, 1934.

27. In answer to the allegations contained in Paragraph "27" of the Statement of Claim, defendant denies that the said additional tax of $175,259.70, and the interest thereon of $12,527.47, was not due and owing to the Government of the United States, and, on the contrary, alleges that said tax and said interest were due and owing and were justly collected. Further answering the allegations contained in Para-

graph "27" of the Statement of Claim, defendant denies that R. B. Mellon overstated his taxable income in his return, and denies that he overpaid his tax on the basis of said return. On the contrary, defendant alleges that said income was understated on the return, and that all payments made on said tax were due and owing to the United States, and were justly and correctly paid. Further answering the allegations contained in Paragraph "27," defendant denies that the income from the said two partnerships, during the year 1920, was not taxable in that year, and, on the contrary, alleges that it was subject to income tax and that the taxes heretofore assessed and collected thereon and in controversy in this action, were in all respects justly and correctly assessed and collected. Further answering the allegations contained in Paragraph "27," defendant denies that the said income was erroneously reported on the return, erroneously increased, and/or erroneously included as taxable income by the Commissioner. On the contrary, defendant alleges that the said income was reported in part on the return, the correct increases were made by the Commissioner of Internal Revenue, and both the original amount reported and the amount of increase were justly and correctly included as taxable income by the Commissioner.

28. In answer to the allegations contained in Paragraph "28" of the Statement of Claim, defendant admits that the Commissioner of Internal Revenue has included in R. B. Mellon's income for the year 1920 the sums of $281,779.95 and $52,814.28. Defendant

denies, however, that said sums were liquidating profits of A. Overholt & Company and West Overton Distilling Company, but, on the contrary, alleges that said sums represent R. B. Mellon's one-third distributive share of the operating income and profits of the aforesaid partnerships of A. Overholt & Company and West Overton Distilling Company, respectively, for the year 1920. Defendant alleges, however, that any action taken by the Commissioner of Internal Revenue with respect to R. B. Mellon's income tax liability for the year 1925 is wholly immaterial and irrelevant to any issue involved in this proceeding, and any such action neither operates to preclude correct action as to the issues herein involved nor as an admission against interest by this defendant or on his behalf. Defendant further alleges that the Commissioner of Internal Revenue has not taken final action with respect to R. B. Mellon's income tax liability for the year 1925. Defendant admits that the Commissioner of Internal Revenue assessed and defendant collected the tax for the year 1920 based upon a net income which included the aforesaid sums of $281,779.95 and $52,814.28. Defendant alleges, however, that the Commissioner of Internal Revenue has not taken final action with respect to R. B. Mellon's income tax liability for the year 1925, and that if tax has been collected on the same income for each of the years 1920 and 1925, proper adjustment can be made by action on R. B. Mellon's refund claim for the year 1925.

29. In answer to the allegations contained in Paragraph "29" of the Statement of Claim, defend-

ant denies that the computation set forth in Exhibit "E" attached to the Statement of Claim is a correct computation of R. B. Mellon's income tax liability for the year 1920, and denies that R. B. Mellon overpaid his income tax for said year. On the contrary, defendant alleges that R. B. Mellon's income tax liability for the year 1920 was correctly determined by the Commissioner of Internal Revenue, and that said taxes and the interst thereon were duly and legally assessed by the Commissioner of Internal Revenue and collected by the defendant.

30. In answer to the allegations contained in Paragraph "30" of the Statement of Claim, defendant denies that he was or is indebted to R. B. Mellon and/or any or all of the plaintiffs in the sum of $187,787.17, with interest thereon from May 19, 1927, as provided by law, or in any sum whatsoever. Defendant owes plaintiff nothing.

NEW MATTER

Second Defense

For a further and second defense to the allegations contained in the Statement of Claim, the defendant, although fully relying on the defenses hereinabove set forth, alleges that the plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust, and are further estopped to assert and claim that such income was not distributed or distributable to R. B. Mellon

if such a trust or trusts existed, and as such not taxable to R. B. Mellon, in that:

1. On or about March 15, 1921, Richard B. Mellon, executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and represented that A. Overholt & Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to Richard B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick.

2 Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Company on the form prescribed for the making of returns by fiduciaries of a trust.

3. In examining the partnership return filed in the name of and for A. Overholt & Company and the income tax return filed by R. B. Mellon for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of A. Overholt & Company, and merely changed the amount of the income so reported.

4. R. B. Mellon first asserted and claimed that said income should be treated as the income of a tax-

able trust long after the filing of R. B. Mellon's claim for refund for the year 1920, and more than six years after March 15, 1921.

5. On or about March 15, 1921, Richard B. Mellon, executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for said West Overton Distilling Company on official form 1065, the form prescribed by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and represented that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to Richard B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick.

6. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns for fiduciaries of a trust.

7. In examining the partnership return filed in the name of and for West Overton Distilling Company and the income tax return filed by R. B. Mellon for 1920, the Commissioner of Internal Revenue accepted the manner and method of reporting the 1920 income of West Overton Distilling Company, and merely changed the amount of the income so reported.

8. R. B. Mellon first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of R. B. Mellon's claim for refund for the year 1920, and more than six years after March 15, 1921.

9. If the income of A. Overholt & Company for the calendar year 1920 had been treated and reported by R. B. Mellon and his brother, Andrew W. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been $551,914.70, computed as follows:

Net income as determined by the Commissioner, as set forth in Para. 19 hereof		$845,339.86
Less: Exemption		1,000.00
Income subject to normal tax..		$844,339.86
Normal tax at 4% on $4,000...$	160.00	
Normal tax at 8% on $840,339.-86	67,227.19	
Surtax on $845,339.86	484,527.51	
Total tax liability	$551,914.70	

10. If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by R. B. Mellon and his brother, Andrew W. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been $66,673.42, computed as follows:

Net income determined by the Commissioner, as set forth in Para. 19 hereof		$158,442.84
Less: Exemption		1,000.00
Income subject to normal tax..		$157,442.84
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $153,442.84	12,275.43	
Surtax on $158,442.84	54,237.99	
Total tax liability		$66,673.42

11. The defendant, the Commissioner of Internal Revenue, and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company, and if said organizations were taxable trusts, as now contended by plaintiffs, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting the aforesaid tax liabilities for 1920 of $551,914.70 and $66,673.42, and plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the United States to collect the said tax liabilities.

12. By reason of the facts aforesaid, plaintiffs are estopped to assert and claim that any portion of

the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income from property held in trust, and are further estopped to assert and claim that such income was not distributed or distributable to R. B. Mellon if such a trust or trusts existed, or that said income should be treated as the income of taxable trusts, and/or that plaintiffs are not indebted to defendant in any amount on account of income taxes of R. B. Mellon for the year 1920.

NEW MATTER

Third Defense.

For a further and separate defense to the allegations contained in the Statement of Claim, although fully relying upon and reserving to himself the defenses hereinbefore set forth, and without waiving the same, or any part thereof, the defendant alleges that the plaintiffs ought not to recover of and from the defendant in this cause, in that:

1. At the time the additional tax for the year 1920 here in controversy was determined, assessed and paid, R. B. Mellon was indebted to the United States in an amount equal to or in excess of the tax and interest so paid by him, even though the income on which the taxes in controversy was asserted be taxable under the provisions of law relating to trusts as income of taxable trusts.

2. If the income of A. Overholt & Company for the calendar year of 1920 had been treated by R. B. Mellon and his brother, Andrew W. Mellon, and/or

the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been $551,914.70, computed as hereinabove alleged.

3. If the income of West Overton Distilling Company for the calendar year 1920 had been treated by R. B. Mellon and his brother, Andrew W. Mellon, and/or by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust would have been $66,673.42, computed as hereinabove alleged.

4. R. B: Mellon and his brother, Andrew W. Mellon, did not file returns as trustees of any such trust or trusts, and have paid no Federal income tax as trustees of any such trust or trusts for the year 1920.

5. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Company were distributed to R. B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of $551,914.70 could have been collected.

6. The amount of money, together wth the value of property so received by R. B. Mellon in distribution, was equal to or in excess of the aforesaid tax liability of $551,914.70, plus interest as provided by law.

7. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, his brother, Andrew W. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of $66,673.42 could have been collected.

8. The amount of money, together with the value of property so received by R. B. Mellon in distribution, was equal to or in excess of the aforesaid tax liability of $66,673.42, plus interest as provided by law.

9. At the time the additional tax for the year 1920 here in controversy was determined, asserted and collected, R. B. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Company and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $187,787.17 collected by the defendant from R. B. Mellon as alleged in the Statement of Claim.

10. By reason of the facts aforesaid, the above amount of $187,787.17 collected by the defendant from R. B. Mellon as alleged in the Statement of Claim, was justly owing to the United States by R. B. Mellon, even though the income for the year 1920 from the property of A. Overholt & Company and West Overton Distilling Company should have been treated under the provisions of law relating to trusts as income of taxable trusts.

WHEREFORE, defendant having fully answered, demands that he have judgment in his favor for his costs in this behalf expended, and for such other and further relief as may be just and proper.

D. B. HEINER,
D. B. HEINER,
Former Collector of Internal Revenue
For the Twenty-Third District of Pennsylvania,
Defendant.

HORATIO S. DUMBAULD,
HORATIO S. DUMBAULD,
United States Attorney.

D. LLOYD CLAYCOMB,
D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for said County and Commonwealth, personally appeared D. B. HEINER, who, being duly sworn according to law, deposes and says that he has read the foregoing amended affidavit of defense and is familiar with the contents thereof, and that the averments of fact set forth therein are true and correct as he verily believes.

D. B. HEINER.

Subscribed and sworn to before me this 18th day of October, 1934.

FRANK J. ATKINS,
Notary Public.

(SEAL)

My commission expires March 2, 1937.

Reply.

No. 6980 Law.

(Filed Oct. 26, 1934.)

AND Now comes the plaintiff, A. W. Mellon, by his attorneys, W. A. Seifert and D. D. Shepard, and for reply to the new matter set forth in the amended affidavit of defense filed in the above-entitled case on October 20, 1934, admits, denies, avers and alleges as follows:

NEW MATTER

SECOND DEFENSE.

Plaintiff denies that he is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust and that he is further estopped to assert and claim that such income was not distributed or distributable to him if such a trust or trusts existed, and as such not taxable to him.

1. Plaintiff admits that on or about March 15, 1921, plaintiff and his brother, Richard B. Mellon,

caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for A. Overholt & Company, formerly a partnership, in liquidation, on form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiff avers that said return constituted a return of income. Plaintiff denies that on said return of income it was claimed and represented that A. Overholt & Company was a partnership, and on the contrary plaintiff avers that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that, in fact and as a matter of law, the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plaintiff avers that the use of a partnership form for the filing of a return of income does not bar nor preclude him from asserting that the tax should have been assessed on the correct and proper basis.

2. Plaintiff admits that neither he nor his brother, Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of A. Overholt & Company, on form 1040, a form prescribed for the making of returns by fiduciaries of a trust.

3. Plaintiff denies that in examining the return of income filed in the name of and for A. Overholt & Company and the income tax return filed by the plain-

tiff for 1920, the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Company and that he merely changed the amount of the income so reported. On the contrary, plaintiff avers that the manner and method of reporting the 1920 income of A. Overholt & Company on said return of income and on plaintiff's said income tax return was to report only profit from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiff avers was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiff avers that in March, 1929, the Commissioner treated both the said profits from bottling, storage and similar items and the proceeds from the sale of whiskey of A. Overholt & Company for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

4. Plaintiff denies that he first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary avers that he asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of A. Overholt & Company were taxable to the plaintiff as income in the year 1925 and not in the year 1920 and although plaintiff filed the claim for refund of the tax for the year 1920 just three

days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiff further avers that he and his brother made a full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

5. Plaintiff admits that on or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for West Overton Distilling Company, formerly a partnership, in liquidation, on form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiff avers that said return constituted a return of income. Plaintiff denies that on said return of income it was claimed and represented that West Overton Distilling Company was a partnership, and on the contrary plaintiff avers that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that in fact and as a matter of law the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plaintiff avers that the use of a partnership form for the filing of a return of income does not bar nor preclude

him from asserting that the tax should have been assessed on the correct and proper basis.

6. Plaintiff admits that neither he nor his brother, Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of West Overton Distilling Company, on form 1040, a form prescribed for the making of returns for fiduciaries of a trust.

7. Plaintiff denies that in examining the return of income filed in the name of and for West Overton Distilling Company and the income tax return filed by the plaintiff for 1920, the Commissioner accepted the manner and method of reporting the 1920 income of West Overton Distilling Company and that he merely changed the amount of the income so reported. On the contrary, plaintiff avers that the manner and method of reporting the 1920 income of West Overton Distilling Company on said return of income and on plaintiff's said income tax return was to report only profit from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiff avers was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiff avers that in March, 1929, the Commissioner treated both said profits from bottling, storage and similar items and the proceeds from the sale of whiskey of West Overton Distilling Company for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

8. Plaintiff denies that he first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary avers that he asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of West Overton Distilling Company were taxable to the plaintiff as income in the year 1925 and not in the year 1920 and although plaintiff filed the claim for refund of the tax for the year 1920 just three days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiff further avers that he and his brother made a full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

9. Plaintiff admits that the correct tax liability for the year 1920 on $845,339.86 of trust income would have been $551,914.70, but denies that, if a taxable trust existed, the income subject to tax was $845,339.86, and on the contrary avers that said trust, if it existed, realized no taxable income until distribution in 1925.

10. Plaintiff admits that the correct tax liability for the year 1920 on $158,442.84 of trust income would

have been $66,673.42, but denies that, if a taxable trust existed, the income subject to tax was $158,442.84, and on the contrary avers that said trust, if it existed, realized no taxable income until distribution in 1925.

11. Plaintiff denies that the defendant, the Commissioner and the United States relied to their prejudice on plaintiff's original position and representation in respect to the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company, and on the contrary avers that the defendant, the Commissioner and the United States did in March, 1929, determine that plaintiff did not realize taxable income in the year 1920 from the operation and sale of capital assets of A. Overholt & Company and West Overton Distilling Company, but that such alleged income was realized and taxable in the year 1925 upon final liquidation and distribution. Plaintiff admits that the Commissioner and the United States are now precluded from assessing and collecting the aforesaid alleged tax liabilities for 1920 of $551,914.70 and $66,673.42. Plaintiff denies that he is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to him; denies that he received any benefit resulting from the inability of the United States to collect the said tax liabilities, and on the contrary avers that the defendant, the Commissioner and the United States, with full knowledge of all the facts fully disclosed by plaintiff, determined in 1929 that the so-called liquidating profits alleged to have been realized in 1920 were

taxable income in 1925 upon final liquidation and distribution, rather than in 1920. Plaintiff further avers that in 1929 he accepted, acted and relied upon the determination of the defendant, the Commissioner and the United States that such alleged profits were taxable income in 1925, and paid the tax thereon as hereinafter averred.

12. For the reasons hereinbefore averred, plaintiff denies that he is estopped to assert and claim that any portion of the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income from property held in trust or that such income was not distributed or distributable to the plaintiff if such a trust or trusts existed, or that said income should be treated as the income of taxable trusts, and/or that plaintiff is not indebted to defendant in any amount on account of income taxes for the year 1920. Plaintiff further avers that the Commissioner acted with full knowledge of the facts in that he had immediate access to all of his books and records and to the books and records of A. Overholt & Company and West Overton Distilling Company in every year from 1918 to 1925, inclusive, and actually examined them; that the returns for each of said former partnerships for the year 1920 showed that said former partnerships were then in liquidation; that the Commissioner was not misled by the returns filed by A. Overholt & Company and West Overton Distilling Company; that there was no misstatement or concealment of facts by them, and there can be no foundation for estoppel because of a mistake of law.

NEW MATTER

Third Defense.

1. Plaintiff denies all the averments of paragraph 1, and on the contrary avers that defendant is indebted to plaintiff in the sum of $202,502.22 with interest thereon from the first day of April, 1927.

2. Plaintiff denies all the averments of paragraph 2, and on the contrary avers that, if the liquidating trustees of the former partnership of A. Overholt & Company for the calendar year 1920 had been treated by either plaintiff and his brother, Richard B. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, however, the said trust did have taxable income in the year 1920, then its tax liability was limited to the tax on the income realized from bottling, storage and similar operations.

3. Plaintiff denies all the averments of paragraph 3, and on the contrary avers that, if the liquidating trustees of the former partnership of West Overton Distilling Company for the calendar year 1920 had been treated by either plaintiff and his brother, Richard B. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, however, the said trust did have taxable income in the year 1920, then its tax liability was limited to a tax on the income realized from bottling, storage and similar operations.

4. Plaintiff denies all the averments of paragraph 4, and on the contrary avers that he and his brother, as liquidating trustees of the former partnerships of A. Overholt & Company and West Overton Distilling Company, filed returns of income for the year 1920 which set forth sufficient facts to put the Commissioner on notice that, as a matter of law, they were in fact trustees of the said former partnerships and taxable as such.

5. Plaintiff admits that on or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Company were distributed to plaintiff, his brother, Richard B. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiff denies that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of $551,914.70, and on the contrary avers that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by plaintiff of a substantial sum of money.

6. Plaintiff admits that the amount of money, together with the value of other property, received by him in distribution was equal to or in excess of the sum of $551,914.70 plus interest as provided by law, but denies for the reasons hereinbefore stated that such sum constituted a tax liability.

7. Plaintiff admits that on or prior to December 31, 1925, all of the moneys, properties and assets of

whatever nature of West Overton Distilling Company were distributed to plaintiff, his brother, Richard B. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiff denies that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of $[illegible],-673.42, and on the contrary avers that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by plaintiff of a substantial sum of money.

8. Plaintiff admits that the amount of money, together with the value of other property, received by him in distribution was equal to or in excess of the sum of $66,673.42 plus interest as provided by law, but denies for the reasons hereinbefore stated that such sum constituted a tax liability.

9. Plaintiff denies all the averments of paragraph 9, and on the contrary avers that the collection by the defendant of the amount of tax of $202,502.22 was in all respects illegal, erroneous and void.

10. Plaintiff denies all the averments of paragraph 10, and on the contrary avers that the collection by the defendant from the plaintiff of the amount of $202,502.22 was in all respects erroneous, illegal and void.

11. Plaintiff avers that on March 15, 1921, he and his brother, R. B. Mellon, made and caused to be filed returns of income for A. Overholt & Company and West Overton Distilling Company as surviving part-

ners and liquidating trustees of A. Overholt & Company and West Overton Distilling Company; that no assessment of any tax for the year 1920 has been made by the Commissioner against them, or either of them, as such surviving partners and liquidating trustees of the said two former partnerships or against the plaintiff as transferee of the assets of such former partnerships or liquidating trusteeships; and that the assessment and collection of any such tax are barred by lapse of time under and pursuant to the applicable statutes of the United States and the tax, if it ever existed, is now extinguished.

12. On or about March 15, 1926, The Union Trust Company of Pittsburgh, liquidating agent of A. Overholt & Company and West Overton Distilling Company for the years subsequent to 1920, made and caused to be filed fiduciary returns of income for the calendar year 1925. On or about the same day, plaintiff filed his income tax return for the year 1925 in which he reported his share of the income of A. Overholt & Company and West Overton Distilling Company as shown on the said returns filed by the liquidating agent. Thereafter and in March, 1929, the Commissioner increased the income for 1925 of both A. Overholt & Company and West Overton Distilling Company by adding to the reported income the net amount of income for the calendar years 1920 to 1924, inclusive, including therein the alleged income of the surviving partners or liquidating trustees of the said two former partnerships for the year 1920. The Commis-

sioner thereupon assessed an additional tax for the year 1925 against plaintiff, and pursuant to notice and demand from defendant, with threats to distrain if the tax should not be paid within ten days, on or about June 13, 1929, plaintiff paid to the defendant said additional tax and interest amounting together to $58,335.34. Plaintiff avers that he has heretofore paid a tax on account of the alleged income of said liquidating trustees for the year 1920, which tax was assessed on income included by the Commissioner for the year 1925 as aforesaid, and that therefore he is not now liable as transferee of said liquidating trusts for any alleged tax liability of such trusts for the year 1920.

WHEREFORE, plaintiff having fully replied, demands judgment in his favor for the amount set out in the statement of claim and for his costs in this behalf expended.

W. A. SEIFERT,
D. D. SHEPARD,
Attorneys for Plaintiff.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for the said county and commonwealth, personally appeared A. W. MELLON, who, being duly sworn according to law, deposes and says that the averments of fact set forth in the foregoing Reply are true and correct as he verily believes.

A. W. MELLON.

Sworn to and subscribed before me this 26th day of October, 1934.

My commission expires June 27, 1936.

P. J. HYLAND,
Notary Public.

(SEAL)

Reply.

No. 6979 Law.

(Filed Oct. 26, 1934.)

AND Now come the plaintiffs, Jennie King Mellon, Richard King Mellon, Sarah Mellon Scaife and The Union Trust Company of Pittsburgh, Executors of the Estate of R. B. Mellon, Deceased, by their attorneys, Wm. M. Robinson, W. A. Seifert and D. D. Shepard, and for reply to the new matter set forth in the amended affidavit of defense filed in the above-entitled case on October 20, 1934, admit, deny, aver and allege as follows:

NEW MATTER

SECOND DEFENSE.

Plaintiffs deny that they are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was income from property held in trust and that they are further estopped to assert and claim that such income was not distributed or distributable to them if such a trust or trusts existed, and as such not taxable to them.

1. Plaintiffs admit that on or about March 15, 1921, R. B. Mellon and his brother, A. W. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for A. Overholt & Company, formerly a partnership, in liquidation, on Form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiffs aver that said return constituted a return of income. Plaintiffs deny that on said return of income it was claimed and represented that A. Overholt & Company was a partnership, and on the contrary plaintiffs aver that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that in fact and as a matter of law the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plaintiffs aver that the use of a partnership form for the filing of a return of income does not bar nor preclude them from asserting that the tax should have been assessed on the correct and proper basis.

2. Plaintiffs admit that neither R. B. Mellon nor his brother, A. W. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of A. Overholt & Company, on form 1040, a form prescribed for the making of returns by fiduciaries of a trust.

3. Plaintiffs deny that in examining the return of income filed in the name of and for A. Overholt &

Company and the income tax return filed by R. B. Mellon for 1920, the Commissioners accepted the manner and method of reporting the 1920 income of A. Overholt & Company and that he merely changed the amount of the income so reported. On the contrary, plaintiffs aver that the manner and method of reporting the 1920 income of A. Overholt & Company on said return of income and on plaintiffs' said income tax return was to report only profit from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiffs aver was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiffs aver that in March, 1929, the Commissioner treated both the profits from bottling, storage and similar items and the proceeds from the sale of whiskey of A. Overholt & Company for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

4. Plaintiffs deny that they first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary aver that they asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of A. Overholt & Company were taxable to the plaintiffs as income in the year 1925 and not in

the year 1920 and although R. B. Mellon filed the claim for refund of the tax for the year 1920 just three days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiffs further aver that R. B. Mellon and his brother made full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

5. Plaintiffs admit that on or about March 15, 1921, R. B. Mellon and his brother, A. W. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a return of income for the calendar year 1920 in the name of and for West Overton Distilling Company, formerly a partnership, in liquidation on form 1065, the form provided by the Commissioner for the making of partnership and personal service corporation return of income. Plaintiffs aver that said return constituted a return of income. Plaintiffs deny that on said return of income it was claimed and represented that West Overton Distilling Company was a partnership, and on the contrary plaintiffs aver that said income tax return duly disclosed the death of Mr. Henry C. Frick on December 2, 1919, and that in fact and as a matter of law, the partnership was dissolved by the death of Mr. Frick and that the surviving partners were liquidating trustees and taxable as such. Plain-

tiffs aver that the use of a partnership form for the filing of a return of income does not bar nor preclude them from asserting that the tax should have been assessed on the correct and proper basis.

6. Plaintiffs admit that neither R. B. Mellon nor his brother, A. W. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920 covering any portion of the income of West Overton Distilling Company, on form 1040, a form prescribed for the making of returns for fiduciaries of a trust.

7. Plaintiffs deny that in examining the return of income filed in the name of and for West Overton Distilling Company and the income tax return filed by R. B. Mellon for 1920, the Commissioner accepted the manner and method of reporting the 1920 income of West Overton Distilling Company and that he merely changed the amount of the income so reported. On the contrary, plaintiffs aver that the manner and method of reporting the 1920 income of West Overton Distilling Company on said return of income and on R. B. Mellon's said income tax return was to report only profits from bottling, storage and similar items and to treat the proceeds from the sale of whiskey, which plaintiffs aver was a capital asset, as capital gain only distributable and taxable upon final liquidation. For further reply, plaintiffs aver that in March, 1929, the Commissioner treated said profits from bottling, storage and similar items and the proceeds from the sale of whiskey of West Overton Distilling Com-

pany for 1920 as taxable income for the year 1925, realized upon final liquidation and distribution.

8. Plaintiffs deny that R. B. Mellon first asserted and claimed that said income should be treated as the income of a taxable trust long after the filing of his claim for refund for the year 1920, and on the contrary aver that he asserted said claim in the first conference granted by the Commissioner after the filing of said claim for refund and then only when it appeared that, although the Commissioner on March 15, 1929, finally determined that the so-called liquidating profits of West Overton Distilling Company were taxable to R. B. Mellon as income in the year 1925 and not in the year 1920 and although R. B. Mellon filed the claim for refund of the tax for the year 1920 just three days later, to-wit, March 19, 1929, the Commissioner was vacillating from one position to the other and was attempting to include the same income in both the year 1920 and the year 1925 and to retain the tax. Plaintiffs further aver that R. B. Mellon and his brother made full disclosure of all the facts and that the Commissioner was in full possession and knowledge of all the facts upon which such a claim as a matter of law could at any time have been asserted.

9. Plaintiffs admit that the correct tax liability for the year 1920 on $845,339.86 of trust income would have been $551,914.70, but deny that, if a taxable trust existed, the income subject to tax was $845,339.86, and on the contrary aver that said trust, if it existed, realized no taxable income until distribution in 1925.

10. Plaintiffs admit that the correct tax liability for the year 1920 on $158,442.84 of trust income would have been $66,673.42, but deny that, if a taxable trust existed, the income subject to tax was $158,442.84, and on the contrary aver that said trust, if it existed, realized no taxable income until distribution in 1925.

11. Plaintiffs deny that the defendant, the Commissioner and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company, and on the contrary aver that the defendant, the Commissioner and the United States did in March, 1929, determine that R. B. Mellon did not realize taxable income in the year 1920 from the operation and sale of capital assets of A. Overholt & Company and West Overton Distilling Company, but that such alleged income was realized and taxable in the year 1925 upon final liquidation and distribution. Plaintiffs admit that the Commissioner and the United States are now precluded from assessing and collecting the aforesaid alleged tax liabilities for 1920 of $551,914.70 and $66,673.42. Plaintiffs deny that they are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed was not taxable to R. B. Mellon; deny that R. B. Mellon received any benefit resulting from the inability of the United States to collect the said tax liabilities, and on the contrary aver that the defendant, the Com-

missioner and the United States, with full knowledge of all the facts fully disclosed by R. B. Mellon, determined in 1929 that the so-called liquidating profits alleged to have been realized in 1920 were taxable income in 1925 upon final liquidation and distribution, rather than in 1920. Plaintiffs further aver that in 1929 R. B. Mellon accepted, acted and relied upon the determination of the defendant, the Commissioner and the United States, that such alleged profits were taxable income in 1925 and paid the tax thereon as hereinafter averred.

12. For the reasons hereinbefore averred, plaintiffs deny that they are estopped to assert and claim that any portion of the income of A. Overholt & Company and West Overton Distilling Company, or either of them, was income from property held in trust or that such income was not distributed or distributable to R. B. Mellon if such a trust or trusts existed, or that said income should be treated as the income of taxable trusts, and/or that plaintiffs are not indebted to defendant in any amount on account of income taxes for the year 1920. Plaintiffs further aver that the Commissioner acted with full knowledge of the facts in that he had immediate access to all of R. B. Mellon's books and records and to the books and records of A. Overholt & Company and West Overton Distilling Company in every year from 1918 to 1925, inclusive, and actually examined them; that the returns for each of said former partnerships for the year 1920 showed that said former partnerships were then in liquidation; that the Commissioner was not misled by the re-

turns filed by A. Overholt & Company and West Overton Distilling Company; that there was no misstatement or concealment of facts by them and there can be no foundation for estoppel because of a mistake of law.

NEW MATTER.

THIRD DEFENSE.

1. Plaintiffs deny all the averments of paragraph 1, and on the contrary aver that defendant is indebted to plaintiffs in the sum of $187,787.17 with interest thereon from the nineteenth day of May, 1927.

2. Plaintiffs deny all the averments of paragraph 2, and on the contrary aver that, if the liquidating trustees of the former partnership of A. Overholt & Company for the calendar year 1920 had been treated by either R. B. Mellon and his brother, A. W. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, however, the said trust did have taxable income in the year 1920, then its tax liability was limited to a tax on the income realized from bottling, storage and similar operations.

3. Plaintiffs deny all the averments of paragraph 3, and on the contrary aver that, if the liquidating trustees of the former partnership of West Overton Distilling Company for the calendar year 1920 had been treated by either R. B. Mellon and his brother, A. W. Mellon, or the Commissioner as a taxable trust, the said trust would have had no taxable income in 1920 and there would have been no tax liability. If, how-

ever, the said trust did have taxable income in the year 1920, then its tax liability was limited to a tax on the income realized from bottling, storage and similar operations.

4. Plaintiffs deny all the averments of paragraph 4, and on the contrary aver that R. B. Mellon and his brother, A. W. Mellon, as liquidating trustees of the former partnerships of A. Overholt & Company and West Overton Distilling Company filed returns of income for the year 1920 which set forth sufficient facts to put the Commissioner on notice that, as a matter of law, they were in fact trustees of the said former partnerships and taxable as such.

5. Plaintiffs admit that on or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Company were distributed to R. B. Mellon, his brother, A. W. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiffs deny that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of $551,914.70, and on the contrary aver that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by R. B. Mellon of a substantial sum of money.

6. Plaintiffs admit that the amount of money, together with the value of other property, received by R. B. Mellon in distribution was equal to or in excess of the sum of $551,914.70 plus interest as provided by law, but deny for the reasons hereinbefore stated that such sum constituted a tax liability.

7. Plaintiffs admit that on or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, his brother, A. W. Mellon, and the Estate of Henry C. Frick, leaving no other assets or property. Plaintiffs deny that the surviving partners either as such or as liquidating trustees or as individuals owed a tax liability of $66,673.42, and on the contrary aver that there was no tax liability at all for the year 1920 and that on the contrary there had been an overpayment by R. B. Mellon of a substantial sum of money.

8. Plaintiffs admit that the amount of money, together with the value of other property, received by R. B. Mellon in distribution was equal to or in excess of the sum of $66,673.42 plus interest as provided by law, but deny for the reasons hereinbefore stated that such sum constituted a tax liability.

9. Plaintiffs deny all the averments of paragraph 9, and on the contrary aver that the collection by the defendant of the amount of tax of $187,787.17 was in all respects illegal, erroneous and void.

10. Plaintiffs deny all the averments of paragraph 10, and on the contrary aver that the collection by the defendant from R. B. Mellon of the amount of $187,787.17 was in all respects erroneous, illegal and void.

11. Plaintiffs aver that on March 15, 1921, R. B. Mellon and his brother, A. W. Mellon, made and caused to be filed returns of income for A. Overholt &

Company and West Overton Distilling Company as surviving partners and liquidating trustees of A. Overholt & Company and West Overton Distilling Company; that no assessment of any tax for the year 1920 has been made by the Commissioner against them, or either of them, as such surviving partners and liquidating trustees of the said two former partnerships or against R. B. Mellon as transferee of the assets of such former partnerships or liquidating trusteeships; and that the assessment and collection of any such tax are barred by lapse of time under and pursuant to the applicable statutes of the United States and the tax, if it ever existed, is now extinguished.

12. On or about March 15, 1926, The Union Trust Company of Pittsburgh, liquidating agent of A. Overholt & Company and West Overton Distilling Company for the years subsequent to 1920, made and caused to be filed fiduciary returns of income for the calendar year 1925. On or about the same day, R. B. Mellon filed his income tax return for the year 1925 in which he reported his share of the income of A. Overholt & Company and West Overton Distilling Company as shown on the said returns filed by the liquidating agent. Thereafter and in March, 1929, the Commissioner increased the income for 1925 of both A. Overholt & Company and West Overton Distilling Company by adding to the reported income the net amount of income for the calendar years 1920 to 1924, inclusive, including therein the alleged income of the surviving partners or liquidating trustees of the said two former partnerships for the year 1920. The Commissioner

thereupon assessed an additional tax for the year 1925 against R. B. Mellon, and pursuant to notice and demand from defendant, with threats to distrain if the tax should not be paid within ten days, on or about May 10, 1927, plaintiffs paid to the defendant said additional tax and interest amounting together to $175,259.70. Plaintiffs aver that R. B. Mellon has heretofore paid a tax on account of the alleged income of said liquidating trustees for the year 1920, which tax was assessed on income included by the Commissioner for the year 1925 as aforesaid, and that, therefore, the plaintiffs are not now liable as transferee of said liquidating trusts for any alleged tax liability of such trusts for the year 1920.

WHEREFORE, plaintiffs having fully replied, demand judgment in their favor for the amount set out in the statement of claim and for their costs in this behalf expended.

WM. W. ROBINSON,
W. A. SEIFERT,
D. D. SHEPARD,
Attorneys for Plaintiffs.

Commonwealth of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for the said county and commonwealth, personally appeared RICHARD KING MELLON, who, being duly sworn according to law, deposes and says

that the averments of fact set forth in the foregoing Reply are true and correct as he verily believes.

RICHARD KING MELLON,
One of the Executors.

Sworn and Subscribed to before me this 26th day of October, 1934.

P. J. HYLAND,
Notary Public.

My Commission Expires June 27, 1936.

Stipulation Waiving Jury Trial.

No. 6980 Law.

(Filed Oct. 29, 1934.)

Now, To-WIT, this 27th day of September, 1934, IT IS HEREBY STIPULATED AND AGREED by and between the above parties, by their attorneys of record, that the cause may be tried and determined by the Court without the intervention of a jury, each party reserving the right of appeal as in such cases made and provided.

SMITH, SHAW, MCCLAY & SEIFERT,
Attorneys for Plaintiff.

HORATIO S. DUMBAULD,
United States Attorney for the Western District of Pennsylvania.

JOHN A. MCCANN,
Special Assistant to the U. S. Attorney,
Attorneys for Defendant.

Stipulation Waiving Jury Trial.

No. 6979 Law.

(Filed Oct. 29, 1934.)

Now, To-Wit, this 27th day of September, 1934, It Is Hereby Stipulated and Agreed by and between the above parties, by their attorneys of record, that the cause may be tried and determined by the Court without the intervention of a jury, each party reserving the right of appeal as in such cases made and provided.

Smith, Shaw, McClay & Seifert,
Attorneys for Plaintiffs.

Horatio S. Dumbauld,
United States Attorney for the Western District of Pennsylvania.

John A. McCann,
Special Assistant to the United States Attorney,
Attorneys for Defendant.

Opinion.

No. 6980 Law.

(Filed Feb. 17, 1936.)

Gibson, *District Judge.*

The Court makes the following:

FINDINGS OF FACT

1. A. W. Mellon, hereinafter called the plaintiff, resided in the City of Pittsburgh, Allegheny County,

Pennsylvania, and in the Western District thereof, when suit was filed.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and has filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit: March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of $919,777.86 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	$229,944.46
June 15, 1921	229,944.46
September 15, 1921	220,293.77
September 15, 1921 (credit on account of overpayment of 1917 tax)	9,650.69
December 15, 1921	229,944.48
Total	$919,777.86

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner"), notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $190,419.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of $190,419.70 for the year 1920, as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $190,419.70 together with interest thereon of $12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

7. On or about April 1, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $190,419.70 and $12,082.52.

8. On or about December 12, 1918, plaintiff, his brother, R. B. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious

Names Act. True and correct copies of said partnership agreements are attached to the statement of claim ship agreements are attached to the statement of claim, made part thereof and marked Exhibits "A" and "B", respectively.

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached to the statement of claim, made part thereof, and marked Exhibits "C" and "D", respectively.

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

13. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

14. On December 2, 1919 and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

15. Plaintiff and R. B. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

16. The Commissioner determined and settled the federal tax liability of the estate of the deceased

partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28, respectively.

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

> "Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925."

"Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of $190,419.70 tax and $12,082,52 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

22. The Commissioner took no action upon plaintiff's claim for refund for more than six months before suit was brought, but has denied said claim subsequent to suit.

23. The sum received from the sale of whiskey certificates by A. Overholt & Company and West Over-

ton Distilling Company on 1920, and prior thereto during the existence of the partnerships was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

24. The Commissioner of Internal Revenue has included liquidating profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

CONCLUSIONS OF LAW

I No taxable gain is realized during the liquidation of a partnership dissolved by the death of a former partner, until the proceeds realized exceed the cost basis to the former partners of their partnership interests.

II The assets of a partnership which ordinarily might be considered stock in trade of a going business become capital assets when the partnership is dissolved by the death of a partner and the partnership interests are in process of liquidation.

III On the sale of such capital assets by such partnership in liquidation, profits may not be computed and taxed prior to final liquidation.

IV Plaintiff is entitled to recover for the full amount of his claim, together with interest according to law.

DISCUSSION

Prior to December of 1918, A. Overholt & Company and West Overton Distilling Company, corporations, operated distilleries in this District. On December 12, 1918, R. B. Mellon, A. W. Mellon and H. C. Frick formed two partnerships, under the same names as the corporations, for the purpose of taking over and liquidating the distilleries. The partners acted together for this purpose from January 1, 1919, to December 2, 1919, when Mr. Frick died. Thereafter A. W. and R. B. Mellon continued the liquidation of the properties.

The partnership agreements each provided: "In case of dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable." On January 31, 1921, the surviving partners appointed The Union Trust Company of Pittsburgh as liquidating agent, and that company continued the liquidation in the same manner as the partners except that no whisky was thereafter sold prior to final sale of the properties. The liquidating agent finished its task in 1925.

In March, 1921, A. W. Mellon and R. B. Mellon each filed his income tax return for 1920, and R. B. Mellon filed tax returns for A. Overholt & Company

and West Overton Distilling Company upon the form prescribed for partnership returns by the Commissioner of Internal Revenue. The partnership returns showed, in the case of each company, a gain arising from the sale of barrels, bottling, etc., and R. B. Mellon and A. W. Mellon each included one-third of such gain as part of his 1920 income. The gain through sales of whisky was not reported as income of the respective partnerships, but a memorandum showing such computed gains was attached to each return. Neither R. B. Mellon nor A. W. Mellon returned his share of such gains as a part of his income. The exclusion of these gains was based upon the theory that the taxpayers were engaged in the conversion of capital assets, and any gain therefrom was not distributive in 1920, and was not distributable, under the circumstances, until it had been made apparent that the proceeds of the liquidation exceeded the cost basis to the former partners of their partnership interests. It was held the profits could not be determined prior to completed liquidation. Also, as a reason for the exclusion, plaintiff was engaged in winding up the affairs of a dissolved partnership.

The Commissioner did not, at first, accede to the contention of the taxpayers, and held the gains upon the sale of whisky to be profits for the year 1920, and distributive in that year. He assessed against A. W. Mellon and R. B. Mellon an additional tax, in amount equal to the principal sum which each seeks to recover in the instant suit brought by him, which was paid under protest. Later the Commissioner held that no

profit was realized until final liquidation. This position was maintained in respect to the years 1921-1925 inclusive, and settlement was made with the Estate of H. C. Frick upon that basis. He reverted to his original holding in 1932, but did not actually disallow the claim of the plaintiff for a refund of the 1920 deficiency tax until after the instant suit was brought.

The profits from liquor sales of 1920 were a part of the profits of the final liquidation in 1925, upon which the plaintiff paid income tax for the latter year, and no return has been made, nor tender of return, of either the tax for 1920 or any portion of the tax for 1925. Hence it is apparent that the plaintiff has been compelled to pay a double tax upon his share of the gain upon whiskey sales in 1920. The gains or losses of 1921-2-3-4 were all included as of 1925 and charged to that year.

Passing for the moment any question as to the propriety of the form of returns made by the two partnerships, it is apparent that the first question before the court is whether the gain for 1920 should be charged to that year or to 1925, as a taxpayer cannot be compelled to pay two income taxes upon the same gain.

We are of opinion that the gain from the sale of whisky in 1920 was not taxable as income in that year. Several reasons for the opinion may be cited. First, the properties held by the two partnerships, dissolved by the death of Mr. Frick, were being liquidated, and the whisky sold was a capital asset until the proceeds of the sale exceeded the cost of the interests of the

partners; that it is unquestioned that the cost to the partners was greater than the proceeds of sale of 1920. See Art. 1570, Regulation 45, promulgated under Revenue Act of 1918. And second, the plaintiff, as a surviving partner, was one of the trustees of the Frick interest with the duty of accounting upon termination of the liquidation; and this liquidation was not, and could not reasonably have been, completed in 1920. It will be remembered, in this connection, that each of the partnerships kept its books in the accrual basis of accounting. The accounting and distribution was not made until 1925, and until that year neither of the surviving partners included cash of the partnerships with his own funds. The defendant has questioned this statement, and points to the books of the partnerships which show that each partner and the Estate of Mr. Frick received large sums of money in the year 1920. These, however, were charged to "Bills Receivable," and appeared as loans. The books also show that these sums were returned, some of them in the year 1920. The book entries and the repayments make it plain, we think, that the sums so received were not paid out in distribution of the gains of the partnerships.

Attention has been called to an opinion of this court in GUCKENHEIMER & BROS. CO. v. HEINER, decided May 12, 1934, which, counsel for defendant claims, is counter to the claim of plaintiff in the instant suit. The conditions of that case are not those of the instant case. The Guckenheimer case was brought by the still existing corporation to recover taxes paid on its be-

half. The liquidation carried on was the liquidation of the interests of former stockholders rather than of the company, which continued in business. The liquidations of the partnerships in the instant action were actually completed, and in 1920 were under the necessity of completion by reason of the provisions of the Uniform Partnership Act of Pennsylvania.

The finding that the gains in 1920 were not distributed or distributive in that year is determinative of the fact that judgment must be entered in favor of the plaintiff. The plaintiff, however, in addition to the facts upon which the instant judgment is based, asserts that the deficiency assessment for the year 1920, was invalid for another reason. He alleges that the surviving members of the partnerships were acting in a fiduciary capacity, and as such constituted a taxable entity, and therefore, even if it were to be held that income had been earned in 1920, the assessment should have been made against the two surviving partners jointly, as trustees, and not against an individual partner, based upon his undistributed share. Against this claim the defendant, in addition to a denial of the general proposition, has contended that the plaintiff would be estopped from setting up such a defense after making returns as a partnership, and has also set up an equitable defense in the nature of recoupment, alleging that if plaintiff and his partners had filed a fiduciary return of the partnerships for 1920, the ultimate individual liability would have been greater than it was under the assessment made, and that plaintiff

with R. B. Mellon and the Frick Estate, as transferees of all the property of the partnerships in 1925, may not now recover when it is apparent that the amount of the taxes assessed and paid by each of them was less than it would ultimately have been if it had been assessed against the surviving partners as fiduciaries.

As to this second claim of the plaintiff, the established facts do not sustain the defense of estoppel. The return was made upon a partnership form, but all the basic facts were shown by it to the Commissioner. The mistake, if such it was, in the return and assessment was a mutual mistake of law. As to the recoupment defense, it was met by the finding that the gain of the partnership in 1920 was not distributed nor distributive. But the second claim of the plaintiff, and the equitable defenses thereto, in the opinion of the court, raise only moot questions, as the return was properly made.

> "On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed."
>
> Sec. 30, Act of March 26, 1915 (P. L. 18).
>
> "Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership."
>
> Sec. 33, Act of 1915.

In addition to the quoted provisions of the Uniform Partnership Act of Pennsylvania, which provide

for the continuance of the business of the partnership for the limited purpose stated therein, a continuance of the partnership after the death of a partner was contemplated by the partnership agreements, which gave surviving partners the right to appoint a liquidating agent. As stated, these questions are moot, in view of the finding that the gains of 1920 did not constitute income from the sale of a stock in trade, but were proceeds from the sale of capital assets which had not, in that year, equaled the amount of the cost bases to the former partners; and the further finding that such gains, in the hands of the surviving partners in trust for the Estate of H. C. Frick, as well as for themselves, were not distributive in 1920.

An order will be made for the entry of judgment for the plaintiff.

ORDER.

No. 6980 Law.

And now, to wit, February 17, 1936, it is hereby ordered that judgment be entered in favor of the plaintiff, A. W. Mellon, and against the defendant, D. B. Heiner, individually and as former Collector of Internal Revenue, in the sum of Two hundred two thousand, five hundred two and 22/100 ($202,502.22) Dollars, with interest from April 1, 1927, according to law.

Per Curiam,

G.

Thereupon, on February 17, 1936, the Clerk of the Court, pursuant to the above order entered judgment in favor of the plaintiff and against the defendant, individually and as collector, in the sum of $202,502.22, with interest from April 1, 1927, according to law, as shown by the docket entries hereinbefore set forth.

Opinion.

No. 6979 Law.

(Filed Feb. 17, 1936.)

GIBSON, *District Judge.*

The court makes the following

FINDINGS OF FACT.

1. R. B. Mellon, hereinafter called the plaintiff, resided in the city of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof, when suit was filed.

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and

has filed his income tax returns on the cash receipts and disbursements basis of accounting.

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania, his income tax return for the calendar year 1920, and upon the dates appointed by law, duly paid to said Collector and to defendant the tax of $406,673.28 shown by said return to be due to the Government of the United States as follows:

March 15, 1921	$101,668.32
June 15, 1921	101,668.32
September 15, 1921	101,668.32
December 15, 1921	101,668.32
Total	$406,673.28

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $175,259.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of $175,259.70 for the

year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $175,259.70 together with interest thereon of $12,527.47, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $175,259.70 and $12,527.47.

8. On or about December 12, 1918, R. B. Mellon, his brother, A. W. Mellon, and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached to the statement of claim, made part thereof and marked Exhibits "A" and "B" respectively.

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached to the Statement of Claim, made part thereof and marked Exhibits "C" and "D", respectively.

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

13. During the period of liquidation, from December 2, 1919, to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

14. On December 2, 1919, and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

15. Plaintiff and A. W. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

16. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28, respectively.

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

> "Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925."
>
> "Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of $175,259.70 and $12,527.47 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

22. The Commissioner took no action upon plaintiff's claim for refund for more than six months before the suit was brought, but has denied said claim subsequent to suit.

23. The sum received from the sale of whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

24. The Commissioner of Internal Revenue has included liquidating profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for the year 1925. He has assessed and collected a tax on the same income in each of said years.

CONCLUSIONS OF LAW

I No Taxable gain is realized during the liquidation of a partnership dissolved by the death of a for-

mer partner, until the proceeds realized exceed the cost bases to the former partners of their partnership interests.

II The assets of a partnership which ordinarily might be considered stock in trade of a going business become capital assets when the partnership is dissolved by the death of a partner and the partnership interests are in process of liquidation.

III On the sale of such capital assets by such partnership in liquidation, profits may not be computed and taxed prior to final liquidation.

IV Plaintiffs are entitled to recover for the full amount of their claims, together with interest according to law.

DISCUSSION

Prior to December of 1918, A. Overholt & Company and West Overton Distilling Company, corporations, operated distilleries in this District. On December 12, 1918, R. B. Mellon, A. W. Mellon and H. C. Frick formed two partnerships, under the same names as the corporations, for the purpose of taking over and liquidating the distilleries. The partners acted together for this purpose from January 1, 1919, to December 2, 1919, when Mr. Frick died. Thereafter A. W. and R. B. Mellon continued the liquidation of the properties.

The partnership agreements each provided: "In case of dissolution of the firm by death of one or more

of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable." On January 31, 1921, the surviving partners appointed the Union Trust Company of Pittsburgh as liquidating agent, and that company continued the liquidation in the same manner as the partners except that no whiskey was thereafter sold prior to final sale of the properties. The liquidating agent finished its task in 1925.

In March, 1921, A. W. Mellon and R. B. Mellon each filed his income tax return for 1920, and R. B. Mellon filed tax returns for A. Overholt & Company and West Overton Distilling Company upon the form prescribed for partnership returns by the Commissioner of Internal Revenue. The partnership returns showed, in the case of each company, a gain arising from the sale of barrels, bottling, etc., and R. B. Mellon and A. W. Mellon each included one-third of such gain as part of his 1920 income. The gain through sales of whisky was not reported as income of the respective partnerships, but a memorandum showing such computed gains was attached to each return. Neither R. B. Mellon nor A. W. Mellon returned his share of such gains as a part of his income. The exclusion of these gains was based upon the theory that the taxpayers were engaged in the conversion of capital assets, and any gain therefrom was not distributive in 1920, and

was not distributable, under the circumstances, until it had been made apparent that the proceeds of the liquidation exceeded the cost basis to the former partners of their partnership interests. It was held the profits could not be determined prior to completed liquidation. Also, as a reason for the exclusion, plaintiffs were engaged in winding up the affairs of a dissolved partnership.

The Commissioner did not, at first, accede to the contention of the taxpayers, and held the gains upon the sale of whisky to be profits for the year 1920, and distributive in that year. He assessed against A. W. Mellon and R. B. Mellon an additional tax, in amount equal to the principal sum which each seeks to recover in the instant suit brought by him, which was paid under protest. Later the Commissioner held that no profit was realized until final liquidation. This position was maintained in respect to the years 1921-1925 inclusive, and settlement was made with the Estate of H. C. Frick upon this basis. He reverted to his original holding in 1932, but did not actually disallow the claims of the respective plaintiffs for a refund of the 1920 deficiency tax until after the instant suits were brought.

The profits from liquor sales of 1920 were a part of the profits of the final liquidation in 1925, upon which the respective plaintiffs paid income tax for the latter year, and no return has been made, nor tender of return, of either the tax for 1920 or any portion of the tax for 1925. Hence it is apparent that the plaintiff in each suit has been compelled to pay a double tax

upon his share of the gain upon whisky sales in 1920. The gains or losses of 1921-2-3-4 were all included as of 1925 and charged to that year.

Passing for the moment any question as to the propriety of the form of returns made by the two partnerships, it is apparent that the first question before the court is whether the gain for 1920 should be charged to that year or to 1925, as a taxpayer cannot be compelled to pay two income taxes upon the same gain.

We are of opinion that the gain from the sale of whisky in 1920 was not taxable as income in that year. Several reasons for the opinion may be cited. First, the properties held by the two partnerships, dissolved by the death of Mr. Frick, were being liquidated, and the whisky sold was a capital asset until the proceeds of the sale exceeded the cost of the interests of the partners; and it is unquestioned that the cost to the partners was greater than the proceeds of sale in 1920. See Art. 1570, Regulation 45 promulgated under Revenue Act of 1918. And second, the plaintiffs, as surviving partners, were trustees of the Frick interest with the duty of accounting upon termination of the liquidation; and this liquidation was not, and could not reasonably have been, completed in 1920. It will be remembered, in this connection, that each of the partnerships kept its books in the accrual basis of accounting. The accounting and distribution was not made until 1925, and until that year neither of the surviving partners included cash of the partnerships with his own funds. The defendant has questioned this state-

ment, and points to the books of the partnerships which show that each plaintiff and the Estate of Mr. Frick received large sums of money in the year 1920. These, however, were charged to "Bills Receivable," and appeared as loans. The books also show that these sums were returned, some of them in the year 1920. The book entries and the repayments make it plain, we think, that the sums so received were not paid out in distribution of the gains of the partnerships.

Attention has been called to an opinion of this court in *Guckenheimer & Bros. Co. v. Heiner,* decided May 12, 1934, which, counsel for defendant claims, is counter to the claims of plaintiffs in the instant suits. The conditions of that case are not those of the instant cases. The Guckenheimer case was brought by the still existing corporation to recover taxes paid on its behalf. The liquidation carried on was the liquidation of the interests of former stockholders rather than of the company, which continued in business. The liquidations of the partnerships in the instant actions were actually completed, and in 1920 were under the necessity of completion by reason of the provisions of the Uniform Partnership Act of Pennsylvania.

The finding that the gains in 1920 were not distributed or distributive in that year is determinative of the fact that judgment must be entered in favor of the plaintiffs. The plaintiff in each case, however, in addition to the facts upon which the instant judgment is based, asserts that the deficiency assessment for the year 1920, was invalid for another reason. He alleges

that the surviving members of the partnerships were acting in a fiduciary capacity, and as such constituted a taxable entity, and therefore, even if it were to be held that income had been earned in 1920, the assessment should have been made against the two surviving partners jointly, as trustees, and not against an individual partner, based upon his undistributed share. Against this claim the defendant, in addition to a denial of the general proposition, has contended that the plaintiffs would be estopped from setting up such a defense after making returns as a partnership, and has also set up an equitable defense in the nature of recoupment, alleging that if plaintiffs had filed a fiduciary return of the partnerships for 1920, the ultimate individual liability would have been greater than it was under the assessment made, and that plaintiffs with the Frick Estate, as transferees of all the property of the partnerships in 1925, may not now recover when it is apparent that the amount of the taxes assessed and paid by each of them was less than it would ultimately have been if it had been assessed against the surviving partners as fiduciaries.

As to this second claim of the plaintiffs, the established facts do not sustain the defense of estoppel. The return was made upon a partnership form, but all the basic facts were shown by it to the Commissioner. The mistake, if such it was, in the return and assessment was a mutual mistake of law. As to the recoupment defense, it was met by the finding that the gain of the partnership in 1920 was not distributed nor distributive. But the second claim of the plaintiffs, and

the equitable defenses thereto, in the opinion of the court, raise only moot questions, as the return was properly made.

"On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed."

Sec. 30, Act of March 26, 1915 (P. L. 18).

"Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership."

Sec. 33, Act of 1915.

In addition to the quoted provisions of the Uniform Partnership Act of Pennsylvania, which provide for the continuance of the business of the partnership for the limited purpose stated therein, a continuance of the partnership after the death of a partner was contemplated by the partnership agreements, which gave surviving partners the right to appoint a liquidating agent. As stated, these questions are moot, in view of the finding that the gains of 1920 did not constitute income from the sale of a stock in trade, but were proceeds from the sale of capital assets which had not, in that year, equaled the amount of the cost bases to the former partners; and the further finding that such gains, in the hands of the surviving partners in trust for the Estate of H. C. Frick, as well as for themselves, were not distributive in 1920.

An order will be made for the entry of judgment for the plaintiff in each case.

ORDER.

No. 6979 Law.

And now, to-wit, February 17, 1936, it is hereby ordered that judgment be entered in favor of the plaintiffs, JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE and THE UNION TRUST COMPANY OF PITTSBURGH, EXECUTORS of the ESTATE of R. B. MELLON, deceased, and against the defendant, D. B. HEINER, individually and as former Collector of Internal Revenue, in the sum of One hundred eighty-seven thousand, seven hundred eighty-seven and 17/100 ($187,787.17) Dollars, with interest from May 19, 1927, according to law.

PER CURIAM,

G.

Thereupon, on February 17, 1936, the Clerk of the Court, pursuant to the above order entered judgment in favor of the plaintiffs and against the defendant, individually and as collector, in the sum of $187,787.17, with interest from May 19, 1927, as shown by the docket entries hereinbefore set forth.

Motion.

No. 6980 Law.

(Filed Apr. 16, 1936.)

Comes now the defendant and presents that this term of Court adjourns on May 3, 1936, and that addi-

tional time is needed within which to prepare and file a bill of exceptions herein.

Wherefore, defendant prays for an extension of time until July 1, 1936, within which to prepare, have allowed, and file said bill of exceptions.

CHARLES F. UHL,
United States Attorney for the
Western District of Pennsylvania,

ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

No objection.

W. A. SEIFERT,
REED, SMITH, SHAW & MCCLAY,
Attorneys for the Plaintiff.

ORDER.

Ordered, adjudged and decreed, that the time for the signing, allowance and filing of the bill of exceptions of defendant is hereby extended to July 1, 1936, and it is further ordered that the present term of this Court be and the same hereby is, extended for said purpose until the expiration of said extended time.

Dated, April 16, 1936.

R. M. GIBSON,
District Judge.

Motion.

No. 6979 Law.

(Filed Apr. 16, 1936.)

Comes now the defendant and presents that this term of Court adjourns on May 3, 1936, and that additional time is needed within which to prepare and file a bill of exceptions herein.

Wherefore, defendant prays for an extension of time until July 1, 1936, within which to prepare, have allowed, and file said bill of exceptions.

CHARLES F. UHL,
United States Attorney for the
Western District of Pennsylvania,

ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

No objection.

W. A. SEIFERT,
REED, SMITH, SHAW & MCCLAY,
Attorneys for the Plaintiff.

ORDER.

Ordered, adjudged and decreed, that the time for the signing, allowance and filing of the bill of exceptions of defendant is hereby extended to July 1, 1936, and it is further ordered that the present term of this

Court be and the same hereby is, extended for said purpose until the expiration of said extended time.

Dated, April 16, 1936.

R. M. GIBSON,
District Judge.

Stipulation.

No. 6980 Law.

(Filed June 10, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time of the appellant to file a transcript of the record on appeal may be extended to and including the tenth day of July, 1936.

W. A. SEIFERT,
REED, SMITH, SHAW & MCCLAY,
Attorneys for the Plaintiff.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania,

ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

ORDER.

In accordance with the foregoing stipulation the time for filing the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out, is extended until the tenth day of July, 1936.

Dated: This 10 day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6979 Law.

(Filed June 10, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time of the appellant to file a transcript of the record on appeal may be extended to and including the tenth day of July, 1936.

W. A. SEIFERT,
REED, SMITH, SHAW & MCCLAY,
Attorneys for the Plaintiff.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania,

ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

ORDER.

In accordance with the foregoing stipulation the time for filing the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out, is extended until the tenth day of July, 1936.

Dated: This 10th day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6980 Law.

(Filed June 20, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the signing, allowance and filing of the bill of exceptions of defendant may be extended to August 1, 1936, and that the time of the appellant to file a transcript of the record on appeal may be extended to August 10, 1936.

REED, SMITH, SHAW & MCCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.
CHARLES F. UHL,
United States Attorney for the
Western District of Pennsylvania,
ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

ORDER.

In accordance with the foregoing stipulation, it is ordered, adjudged and decreed that the time for the signing, allowance and filing of the bill of exceptions of defendant be and the same hereby is, extended to August 1, 1936, and that the prior term of this court (heretofore extended by order to July 1, 1936) be and the same hereby is, extended for said purpose until the expiration of said extended time.

It is further ordered that the time for the filing of the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out (said time heretofore having been extended to July 10, 1936) be and the same hereby is, extended until the tenth day of August, 1936.

Dated this 20 day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6979 Law.

(Filed June 20, 1936.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the signing, allowance and filing of the bill of exceptions of defendant may be extended to August 1, 1936, and that the time of the appellant to file a tran-

script of the record on appeal may be extended to August 10, 1936.

REED, SMITH, SHAW & MCCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania,

ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

ORDER.

In accordance with the foregoing stipulation, it is ordered, adjudged and decreed that the time for the signing, allowance and filing of the bill of exceptions of defendant be and the same hereby is, extended to August 1, 1936, and that the prior term of this court (heretofore extended by order to July 1, 1936) be and the same hereby is, extended for said purpose until the expiration of said extended time.

It is further ordered that the time for the filing of the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out (said time heretofore having been extended to July 10, 1936) be and the same hereby is, extended until the tenth day of August, 1936.

Dated this 20 day of June, 1936.

R. M. GIBSON,
Judge.

Stipulation.

No. 6980 Law.

No. 6979 Law.

(Filed June 20, 1936.)

It is stipulated and agreed by the attorneys for the respective parties that the two above-entitled actions may be consolidated for all purposes of appeal, that one bill of exceptions shall be sufficient for both cases, and that the records on appeal in these cases may be consolidated, printed and filed as one record, and that the Court may enter an order accordingly.

REED, SMITH, SHAW & MCCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania,

ORRIS BENNETT,
Special Assistant to the U. S. Attorney,
Attorneys for the Defendant.

ORDER.

In accordance with the foregoing stipulation it is ordered that the above-entitled actions be consolidated for the purpose of appeal, that one bill of exceptions shall be sufficient for both cases, and that the records

on appeal be consolidated, printed and filed as one record.

Dated June 20, 1936.

R. M. GIBSON,
D. J.

Petition for Appeal.

No. 6980 Law.

(Filed May 13, 1936.)

To the Honorable Robert M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania:

And now, to-wit, this 13 day of May, A. D. 1936, comes D. B. Heiner, individually and as former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania, the above named defendant, by his attorneys Charles F. Uhl, United States Attorney in and for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney in and for said District, feeling aggrieved by the judgment entered herein on February 17, 1936, in favor of the plaintiff and against the defendant, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons set forth in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be

sent to the Circuit Court of Appeals for the Third Circuit in accordance with law and the practice of this Court.

Defendant, your petitioner, further prays that citation of appeal issue and be served upon the plaintiff herein according to law and the practice of the Court, and that upon the service of said citation said appeal may operate as a supersedeas until final disposition of the cause, this being a case brought up by the Treasury Department, a department of the Government of the United States of America, and by direction of the Attorney General thereof.

Defendant, your petitioner, further prays that after due hearing, judgment be entered reversing the judgment of the said District Court.

Defendant, your petitioner, further prays for all orders necessary in the premises and for general relief, and your petitioner will ever pray, etc.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania,

D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

ORDER.

It is ordered that the appeal as above prayed for be allowed, and that said appeal shall operate as a

supersedeas with respect to the judgment against the defendant.

Dated, Pittsburgh, Pennsylvania, May 13, 1936.

R. M. GIBSON,
United States District Judge.

Petition for Appeal.

No. 6979 Law.

(Filed May 13, 1936.)

To the Honorable Robert M. Gibson, Judge of the District Court of the United States for the Western District of Pennsylvania:

And now, to-wit, this 13th day of May, A. D. 1936, comes D. B. Heiner, individually and as former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania, the above named defendant, by his attorneys Charles F. Uhl, United States Attorney in and for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney in and for said District, feeling aggrieved by the judgment entered herein on February 17, 1936, in favor of the plaintiffs and against the defendant, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons set forth in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated,

may be sent to the Circuit Court of Appeals for the Third Circuit in accordance with law and the practice of this Court.

Defendant, your petitioner, further prays that citation of appeal issue nd be served upon the plaintiffs herein according t law and the practice of the Court, and that upon the service of said citation said appeal may operate as a supersedeas until final disposition of the cause, this being a case brought up by the Treasury Department, a department of the Government of the United States of America, and by direction of the Attorney General thereof.

Defendant, your petitioner, further prays that after due hearing, judgment be entered reversing the judgment of the said District Court.

Defendant, your petitioner, further prays for all orders necessary in the premises and for general relief, and your petitioner will ever pray, etc.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania,

D. LLOYD CLAYCOMB,
Assistant United States Attorney,
Attorneys for the Defendant.

ORDER.

It is ordered that the appeal as above prayed for be allowed, and that said appeal shall operate as a

supersedeas with respect to the judgment against the defendant.

Dated, Pittsburgh, Pennsylvania, May 13, 1936.

R. M. GIBSON,
United States District Judge.

Assignment of Errors.

No. 6980 Law.

(Filed May 13, 1936.)

AND Now, to-wit: this 13th day of May, A. D. 1936, comes the defendant D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-Third District of Pennsylvana, by his attorney Charles F. Uhl, United States Attorney in and for the Western District of Pennsylvania, and, in connection with his appeal, says that in the record, proceedings, findings of fact, conclusions of law, and final judgment in said cause, manifest errors intervene to his prejudice and injury, and he assigns and relies upon the following errors to reverse the judgment entered herein:

1. The Court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant.

2. The Court erred in overruling defendant's motion for judgment upon conclusion of the plaintiff's case.

3. The Court erred in overruling defendant's motion for judgment made and filed at the close of all of the evidence and before submission of the case to the Court.

4. The Court erred in refusing to grant each and every part of the defendant's requests for special findings of fact and conclusions of law.

5. The Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.

6. The Court erred in admitting in evidence, over objection and exception of the defendant, two written agreements dated January 31, 1921, whereby the Union Trust Company of Pittsburgh was appointed so-called liquidating agent with respect to the partnerships A. Overholt & Co. and West Overton Distilling Company, marked Exhibits C. and D attached to plaintiff's statement of claim, for the reason that said instruments are irrelevant and immaterial because they refer to actions of the parties subsequent to 1920; that 1920 is the only tax year involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in the case.

7. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 13 of plaintiff's statement of claim reading as follows:

> 13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that the same is irrelevant and immaterial and is not admitted by the amended affidavit of defense.

8. The Court erred in admitting in evidence, over objection and exception of the defendant, that part of Paragraph 14 of plaintiff's statement of claim reading "During the period of liquidation", in the first line, and the words "liquidating trustees", for the reason that they tender conclusions of law and not statements of fact and are not admitted by the amended affidavit of defense. Said Paragraph 14, as admitted in evidence, reads as follows:

> 14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

9. The Court erred in admitting in evidence, over objection and exception of the defendant the words in Paragraph 16 of plaintiff's statement of claim reading "while acting in the capacity of liquidating trustees" and the words "treating the same as trust properties", for the reason that the same are conclusions of law and are not admitted by the amended affidavit of defense. Said Paragraph 16 as admitted by the Court reads as follows:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

10. The Court erred in admitting, over objection and exception of the defendant, Paragraph 17 of plaintiff's statement of claim, reading as follows:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that the same is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose, and not admitted by the amended affidavit of defense.

11. The Court erred in admitting, over defendant's objection and exception, the following portion of Paragraph 18 of plaintiff's statement of claim, with the inclusion of the word "undistributed", for the reason that the same is irrelevant and immaterial and is properly traversed by the amended affidavit of defense. Paragraph 18 as admitted by the Court, with the inclusion of said word, reads as follows:

18. In his return for said year 1920, plaintiff* * *included as taxable profit his undistributed share of the so-called* * *profits of A. Overholt & Company in the amount of $48,350.74, and his share of the so-called * * * profits of West Overton Distilling Company in the amount of $5,960.55 * * *.

12. The Court erred in admitting, over objection and exception of the defendant, Paragraph 20 of plaintiff's statement of claim, as follows:

> 20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that the same is wholly immaterial and irrelevant to any of the issues in this case and is not admitted by the amended affidavit of defense.

13. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 21 of plaintiff's statement of claim, reading as follows:

> 21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

" 'Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.' "

" 'Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.' "

for the reason that the affirmative matter set up by defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of plaintiff's statement of claim, and for the further reason that in any event said allegations are wholly irrelevant and immaterial.

14. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 22 of plaintiff's statement of claim reading as follows:

> 22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the difference between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive.
> * * *

for the reason that the same is irrelevant and immaterial for the reasons specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that the same is not admitted by said amended affidavit of defense.

15. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 23 of plaintiff's statement of claim, reading as follows:

> '23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of $48,906.45 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:
>
> > " 'Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.' "

for the reason that said Paragraph 23 is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case,

and is redundant and is not admitted by the amended affidavit of defense and because the amended affidavit of defense specifically alleges that a claim for refund filed by plaintiff for 1925 was still pending, undisposed of, by the Commissioner of Internal Revenue and that said 1925 claim was based, in part, on the alleged inclusion of 1920 operating profits of the partnerships.

16. The Court erred in admitting in evidence, over objection and exception of the defendant, that part of Paragraph 28 of plaintiff's statement of claim reading "and has also included said profits in plaintiff's income for 1925", and the last sentence of said Paragraph 28 reading "He has assessed and collected a tax on the same income in each of said years", for the reason that same are irrelevant and immaterial and because the amended affidavit of defense specifically alleges that no final action had yet been taken by the Commissioner with respect to plaintiff's income tax liability for 1925. Said Paragraph 28 as admitted in evidence, with the inclusion of said duly objected to parts, reads as follows:

> 28. The Commissioner of Internal Revenue has included * * * profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

17. The Court erred in overruling defendant's objection to the following question asked by plaintiff's

counsel of the witness Hicks, on the ground that the same called for a conclusion of the witness and was not the best evidence, and was leading and suggestive:

Q. Was that carried on all through the years from 1919 to 1925?

A. Yes.

18. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of the witness Hicks, and in overruling defendant's motion to strike the following answer thereto:

Q. Was there a profit made out of bottling?

A. There was a profit made on bottling.

for the reason that said question is leading and suggestive.

19. The Court erred in overruling defendant's motion to strike the following answer of the witness Hicks to the following question:

Q. After that what did you do?

A. Decided—the partnership decided not to sell anything unless they could sell the balance of the stock to some one person or concern.

for the reason that said question is not confined to the year 1920, which is the only year in issue in this case.

20. The Court erred in overruling defendant's objection to the following questions, and in allowing the same to be answered by the witness Hicks:

Q. In 1921—or until the final sale in 1925, had you any negotiations with anyone as to the sale of the entire plant?

A. We had several inquiries. Mr. Rosensteel—I think that was in 1922, but he made us no real offer; and Mr. Pell—

Q. Mr. Pell of New York, a broker, finally made the sale?

A. Yes.

Q. And prior to the final sale had he introduced you to any other purchaser?

A. Yes, he had.

for the reason that the same are irrelevant and immaterial.

21. The Court erred in overruling the objection of the defendant to the following question, and in allowing the same to be answered by witness Hicks:

Q. Was there any distribution of profits or of any money realized from the sale of whiskey made to the surviving partners or the estate of the deceased partner up until the year 1925?

A. No, sir.

for the reason that said question calls for a conclusion of the witness, is incompetent, irrelevant and immaterial and not the best evidence.

22. The Court erred in overruling defendant's objection to the following question, and in allowing it to be answered:

Q. Mr. Hicks, in 1920 were there any discussions in Washington by Government officials relating to the whiskey business which might result in the expenditure of a large amount of money by distillers?

A. Yes.

for the reason that the same is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues involved in the case, and for the further reason that the testimony or the proof offered is too general and does not establish or tend to establish the question of whether or not there were debts and contingent liabilities, or the amounts of them, and for the further reason that the offer of proof is not a tender of an issue of fact but a tender of an issue of law, and has no bearing whatsoever upon the right of the Government to levy and collect a tax for the year 1920.

23. The Court erred in refusing to sustain defendant's objection to the following questions and in overruling defendant's motion to strike the following answers thereto of the witness Hicks:

Q. Mr. Hicks, how much whiskey was there on hand in 1920?

A. It would be pretty hard to state just exactly the amount, but I would say around sixty thousand in the two distilleries.

Q. Barrels?

A. Yes.

for the reason that such testimony is not the best evidence and that the question is not confined to a specific time.

24. The Court erred in overruling defendant's motion to strike the answer of plaintiff's witness Seifert to the following question:

Q. Were you in 1920 attorney for Messrs. A. W. and R. B. Mellon in conjunction with the A.

Overholt & Company and West Overton Distilling Company?

A. Mr. James H. Beal, former partner of Reed, Smith, Shaw & Beal, and myself were counsel for liquidating trustees of A. Overholt & Company and the West Overton Distilling Company during the year 1920.

for the reason that the answer was not responsive to the question.

25. The Court erred in overruling defendant's objection to the following question, and in allowing the same to be answered by the witness Seifert:

Q. When there did you hear any rumors, definite or otherwise, in regard to certain proposed policies which the Government might adopt in regard to imposition of a floor tax on whiskey, in regard to the requiring the removal of all whiskey to concentration warehouses, and in regard to requiring all whiskey to be bottled immediately?

A. I did.

for the reason that said question is argumentative, is incompetent, irrelevant and immaterial, and calls for a conclusion of the witness and is too general.

26. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered, and in overruling defendant's motion to strike said answer thereto:

Q. Did you as attorney for Messrs. A. W. and R. B. Mellon advise them or their associate in

regard to the distribution of profits or of the profits from the sale of whiskey of the two former partnerships, A. Overholt & Company and West Overton Distilling Company?

A. As counsel with Mr. James H. Beal, we advised Mr. R. B. Mellon, who was the managing partner of A. Overholt & Company, partnership—managing partner of the surviving partners, A. W. Mellon and R. B. Mellon, of the West Overton Distilling Company and A. Overholt & Company, that no distribution could be made until certain questions had been settled—as definitely as we as counsel could advise them—about a possible floor tax, possible expense and tax involved in removing the whiskey to Government warehouses, should the Government require that, possible tax and expense involved in bottling the whiskey which was then in the distilleries at West Overton and A. Overholt & Company's plant at Bradford.

for the reason that the question is irrelevant and immaterial and not binding on the defendant and, with respect to the motion to strike, for the reason that the answer is not responsive but is argumentative and invades the province of the Court, and doeh not tend to prove or disprove any issue involved in this case.

27. The Court erred in overruling defendant's motion to strike the following question and answer thereto of the witness Seifert:

Q. Would these matters have involved any amount of money, if they had been adopted by the Government?

A. They would have involved very large sums of money, sums of money larger than the company at that time would have been—or sums larger than the surviving partners at that time would have been able to have taken care of out of the then assets of the partnership.

for the reason that the question calls for a conclusion of the witness and the answer is a conclusion, and neither tends to prove or disprove any issue in the case.

28. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing it to be answered:

Q. Did the fact that a tax might be assessed on all whiskey, either as a floor tax or as an Internal Revenue tax upon bottling, enter into your consideration in giving your advice to Messrs. A. W. and R. B. Mellon?

A. It certainly did.

for the reason that the same is incompetent, irrelevant and immaterial.

29. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following questions:

Q. Do you personally know whether the Commissioner declared a deficiency in income tax against the two corporations for any of the years 1916, '17 or '18?

A. I know that the Commissioner—

Q. Just answer whether you know or not.

A. If you mean by "asserting deficiency" proposing deficiency in letters which were addressed to the corporations, I will answer that question yes.

for the reason that the answer is not responsive.

30. The Court erred in overruling defendant's objection to the following questions asked of the witness Seifert, and in allowing the same to be answered:

Q. Approximately what do they amount to?

A. About $550,000 for the years '16, '17 and '18.

for the reason that it is immaterial and irrelevant to the issues involved in this case what deficiencies may have been asserted or determined prior to the year 1920.

31. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered:

Q. When that distribution was made, did you or did you not advise them with respect to the unpaid income taxes and whether or not any part should be retained to meet those payments when they were demanded.

A. Yes, sir.

for the reason that the same is incompetent, irrelevant and immaterial, as well as leading.

32. The Court erred in overruling defendant's motion to strike the following question and answer with respect to the witness Seifert:

Q. What was your advise to the surviving partners in the year 1925?

A. Our advice was that no distribution of any of the assets of the partnership could be made until all debts had been discharged and all possible contingent liabilities disposed of.

for the reason that the same is incompetent, irrelevant, immaterial and, in any event, the answer is not responsive to the question and cannot bind the defendant.

33. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following question:

Q. In the year 1925, I mean.

A. In the year 1925, as the assets had been disposed of in bulk, we advised that distribution could then be made of everything except what might be necessary to take care of undisposed of Federal income and excess profits tax liabilities.

for the reason that the same is immaterial and incompetent.

34. The Court erred in overruling defendant's motion to strike the entire testimony of plaintiff's witness Seifert, for the reason that said testimony does not prove or tend to prove any issue involved in this case; the testimony is argumentative, an expression of conclusions by the witness, and is incompetent, irrelevant and immaterial.

35. The Court erred in refusing to admit in evidence, as an admission by plaintiff because of insufficient denial thereof, the following portion of Paragraph 11 of defendant's second defense to plaintiff's statement of claim and in sustaining plaintiff's objection thereto:

11. The defendant, the Commissioner of Internal Revenue, and the United States relied to their prejudice on plaintiff's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company.

36. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of the following offer of proof by defendant's witness Updike, after being duly qualified:

The result of a computation of the tax of the plaintiff for the year 1925, in accordance with Bureau letter dated March 15, 1929, in evidence, eliminating yearly gains and losses for the period from December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income which would show that plaintiff underpaid his tax for the year 1925, admitting for said purpose everything contended for by plaintiff. It was offered to rebut plaintiff's allegation in Paragraph 28 of its statement of claim that there resulted, by reason of the assertion of a deficiency for 1925, double taxation on the same income, namely, for 1920 and 1925, defendant offered to show by this computation and proof that there has been no double taxation; that such computation was also offered in rebuttal of the latter allegation in the statement of claim. The Court was advised that said Paragraph 28 of the statement of claim was one of

the paragraphs to which defendant made objection on the ground that it is irrelevant and immaterial and on which defendant says that if the Court decides adversely to defendant's contention in that respect, then defendant is left without any proof rebutting the inference of the allegation in the statement of claim. The Court was also advised that the proof would show that, taking the amount determined by the Commissioner as the amount for 1925, which plaintiff now contends included the incomes for 1920 and the incomes and losses for the intervening years, that defendant proposed to deduct those amounts in this computation and to show that the tax on the remainder amounts to more than the plaintiff claims he is entitled to have refunded for 1925.

37. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of defendant's offer to prove by the witness Updike that a computation of the tax of A. W. Mellon for 1925, in accordance with Bureau letter dated March 15, 1929, eliminating yearly gains and losses for the period December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, will show that the plaintiff A. W. Mellon has underpaid his tax for the year 1925 in the amount of $81,971.53.

38. The Court erred in allowing the witness Banks to answer, over defendant's objection, the following question interposed by plaintiff's counsel during re-direct examination:

Q. Were there additional repayments in the year 1922?

A. In the year 1922 the ledger account shows $90,000 repaid to the partnership by the individuals.

39. The Court erred in not ruling, prior to conclusion of the trial, on the admissibility of the testimony of the witness Banks, because all of his testimony was objected to by plaintiff and parts objected to by defendant and all of the Court's rulings were: "overruled for the present"; that it does not appear by any rulings whether the Court considered the witness's testimony as admitted and disbelieved by him or excluded consideration of said testimony in arriving at his findings, conclusions and judgment.

40. The Court erred in admitting in evidence, over defendant's objection and exception, plaintiff's Exhibit No. 5, being a certified copy of decree of the Orphans' Court of Allegheny County, entered December 24, 1931, respecting final distribution of the Estate of Henry C. Frick, for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issues involved in this case. It is mere hearsay and is not binding on the defendant and not proper rebuttal.

41. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of its rebuttal witness Buchanan, and in allowing the same to be answered:

Q. In connection with income and estate tax on the Estate of Henry C. Frick, did you have up

with the Bureau of Internal Revenue at Washington the question of the taxes growing out of the liquidation of A. Overholt & Company and the West Overton Distilling Company?

A. I did.

for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issue involved in the case, and is not proper rebuttal testimony and for the further reason that the basis for computing the gain or loss in connection with arriving at the income tax due from an estate is on a different basis and under a different statute entirely from that involving individuals, and the basis of values is entirely different; and this offer of testimony has no relevancy or materiality to any of these issues. The Estate of Henry C. Frick is not a party to this proceeding, and is not involved, and any action that the Commissioner may have taken with reference to that taxpayer, if it should be erroneous, does not preclude the Commissioner from taking a correct action against some other taxpayer.

42. The Court erred in overruling defendant's objection to the following question asked by plaintiff of his rebuttal witness Buchanan, and in allowing the same to be answered:

Q. When was the settlement made with the Bureau of Internal Revenue in connection with Mr. Frick's income taxes on this liquidation?

A. In the year 1928.

for the same reasons as given in support of the immediately previous objection.

43. The Court erred in admitting in evidence, over defendant's objection and exception, plaintiff's Exhibit No. 6, being copy of a letter addressed to the witness Buchanan as counsel for the Estate of Henry C. Frick, covering the income tax liability of the Frick Estate from December 3, 1919 to the end of 1923, for the reason that the same is not the original and is incompetent, irrelevant and immaterial, and for the further reasons assigned in support of the two immediately preceding objections.

44. The Court erred in overruling defendant's objection to the following question and in allowing the same to be answered by plaintiff's witness Buchanan, and in overruling defendant's motion to strike the following answer thereto as not being responsive and being incompetent, irrelevant and immaterial:

Q. That is what I meant. And did you reach any understanding or agreement with respect to settlement on that basis?

A. Before or in the course of the hearings on the question of A. Overholt & Company income in Washington, in the case of the Estate of H. C. Frick, I conferred with Mr. Seifert as attorney for the other partners of that firm, and I was authorized by Mr. Seifert to say that the ruling made in the case of the Estate of H. C. Frick could be made also in the cases of the other two partners, which had not yet been reached in audit, as I understood. I so advised the conference in Washington.

45. The Court erred in overruling defendant's objections to the following questions asked by plaintiff of the witness Buchanan, and in allowing the same to be answered:

Q. What was the ruling in 1925—as to 1925 income?

A. Shall I read into the record the ruling?

Q. Yes.

A. The ruling for 1925 is somewhat lengthy. It begins this way: "The following adjustments have been made in net capital gain as set up in Exhibit 'B' revised"—Perhaps I can show it to the attorney for the United States and have it copied into the record instead of reading all these figures.

for the same reasons as noted in support of the four immediately previous objections.

46. The Court erred in overruling defendant's objection to the following questions asked of the witness Buchanan, and in allowing the same to be answered:

Q. Well, can you give us the effect of that ruling?

A. The amount received by the estate in 1925—

Q. Just a moment. I mean the basis for the ruling; can you give that?

A. That is what I am trying to give. The amount received by the estate in liquidation in 1925 was shown, and the cost of the decedent's interest based on an amended balance sheet of

December 2, 1919, and giving effect to adjustments made in the audit of the 1918 return, was shown; a comparison of those two figures showed a profit. A similar comparison in the case of the West Overton Distilling Company showed a profit; and these profits were shown in net capital gain. I would like to make this explanation, however: that this was not the final letter received by the Estate of H. C. Frick, which did not come until February of 1928. On account of other adjustments in tax liability, the taxpayer did not elect to take advantage of capital gain rates, because there would be no advantage in doing so, and therefore the ultimate tax was not at capital gain rates.

for the reason that the questions call for a conclusion of the witness.

47. The Court erred in overruling defendant's motion to strike all the testimony of plaintiff's rebuttal witness Buchanan for the reason that the same is incompetent, irrelevant, and immaterial, hearsay, and not binding on the defendant, and not proper rebuttal testimony, not tending to prove or disprove any issue involved in this case.

48. The Court erred in finding as a matter of fact that (Finding No. 5):

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner"), notified plaintiff that his tax return for the year 1920 had been examined in

connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $190,419.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is vague, indefinite, misleading and contrary to the undisputed evidence, in that, as shown by Defendant's Exhibit E, said letter of February 21, 1927 was a sixty-day deficiency letter advising plaintiff that there appeared to be a deficiency in tax for 1920 of $190,-419.70 and advising him of his right to appeal from said determination by the filing of his petition with the Board of Tax Appeals within sixty days, and that said tentative determination of deficiency resulted from the Commissioner including in plaintiff's individual income his distributive share in the net income of the partnerships A. Overholt & Company and West Overton Distilling Company, with the inclusion in the net income of said partnerships of profit on sales of whiskey by each of said partnerships, which profit plaintiff had omitted in his individual income tax return for 1920.

49. The Court erred in finding as a matter of fact that (Finding No. 6):

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Com-

missioner had assessed the deficiency in tax of $190,419.70 for the year 1920, as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $190,419.70 together with interest thereon of $12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is contrary to the undisputed evidence, in that, as shown by defendant's Exhibit S, the plaintiff had, in writing, waived his right to file a petition with the Board of Tax Appeals for a redetermination of said deficiency in tax for 1920 and had consented, in writing, to the immediate assessment and collection of said tax; that plaintiff voluntarily made payment of said deficiency assessment without threats, as found by the Court.

50. The Court erred in finding as a matter of fact that (Finding No. 7):

7. On or about April 1, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $190,419.70 and $12,082.52.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is contrary to the undisputed evidence, in that, as shown by defendant's Exhibit S, plaintiff, in writing, consented to the assessment and immediate collection

of said tax and interest and voluntarily paid the same to defendant upon receipt of notice that said tax and interest had been assessed.

51. The Court erred in finding as a matter of fact that (Finding No. 9):

> 9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

for the reason that there is no substantial evidence in the record to support said finding.

52. The Court erred in finding as a matter of fact that (Finding No. 10):

> 10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which

are attached to the statement of claim, made part thereof, and marked Exhibits "C" and "D", respectively.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 11 of plaintiff's statement of claim, the latter portion of which paragraph was duly denied by defendant in his amended affidavit of defense.

53. The Court erred in finding as a matter of fact that (Finding No. 11):

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 12 of plaintiff's statement of claim which specifically denies said paragraph and alleges that said partnerships' books and records for the year 1920 were kept by the accrual method of accounting.

54. The Court erred in finding as a matter of fact that (Finding No. 12):

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and that said finding

is identical in language with Paragraph 13 of plaintiff's statement of claim, which paragraph is not admitted by the defendants amended affidavit of defense.

55. The Court erred in finding as a matter of fact that (Finding No. 13):

> 13. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 14 of plaintiff's statement of claim, which is duly traversed by Paragraph 14 of defendant's amended affidavit of defense.

56. The Court erred in finding as a matter of fact that (Finding No. 14):

> 14. On December 2, 1919 and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial and contrary to the undisputed evidence, in that the testimony of defendant's witness Banks relative to the books of the A. Overholt & Company and defendant's Exhibit MMM, being copy of accounts receivable of the A. Overholt & Company, showed distributions in fact to have been made by the A. Overholt & Company to plaintiff, R. B. Mellon and the Frick Estate during 1920.

57. The Court erred in finding as a matter of fact that (Finding No. 15):

> 15. Plaintiff and R. B. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 16 of plaintiff's statement of claim, which is not admitted by defendant's amended affidavit of defense.

58. The Court erred in finding as a matter of fact that (Finding No. 16):

> 16. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt

& Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial, as specifically set forth in Paragraph 17 of the defendant's amended affidavit of defense.

59. The Court erred in finding as a matter of fact that (Finding No. 17):

17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28, repectively.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 17 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 17 of defendant's amended affidavit of defense.

60. The Court erred in finding as a matter of fact that (Finding No. 18):

18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said

years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is substantially identical in language with Paragraph 20 of plaintiff's statement of claim, is wholly immaterial as specifically set forth in Paragraph 20 of defendant's amended affidavit of defense.

61. The Court erred in finding as a matter of fact that (Finding No. 19):

19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

"Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

"Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language

with Paragraph 21 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 21 of defendant's amended affidavit of defense.

62. The Court erred in finding as a matter of fact that (Finding No. 20):

> 20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 22 of plaintiff's statement of claim, is wholly immaterial as specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that said finding is contrary to the undisputed evidence, in that, after defendant with leave of Court amended his amended affidavit of defense so as to specifically deny the allegations of the second sentence of said Paragraph 22 in the statement of claim, being identical with the second sentence of the Court's finding No. 20, and it was shown by the testimony of the witness Banks and by defendant's Exhibit MMM that the amounts actually received in liquidation in 1925 did not include the amounts dis-

tributed during 1920 and succeeding years immediately prior to final liquidation of said partnerships.

63. The Court erred in finding as a matter of fact that (Finding No. 21):

> 21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of $190,419.70 tax and $12,082.52 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 25 of plaintiff's statement of claim, is duly traversed by Paragraph 25 of defendant's amended affidavit of defense.

64. The Court erred in finding as a matter of fact that (Finding No. 23):

> 23. The sum received from the sale of Whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding is wholly immaterial.

65. The Court erred in finding as a matter of fact that (Finding No. 24):

> 24. The Commissioner of Internal Revenue has included liquidating profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding, which is identical in language with Paragraph 28 of plaintiff's statement of claim, is wholly immaterial for the reasons specifically set forth in Paragraph 28 of defendant's amended affidavit of defense.

66. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 1):

> The praecipe for summons in this action was filed on March 23, 1932, and the Statement of Claim herein was filed on October 24, 1933, by plaintiff, A. W. Mellon, a resident of the City of Pittsburgh, Allegheny County, Pennsylvania.

67. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 3):

> During the year 1920, plaintiff kept his books and records and filed his income tax return for

said year on the cash receipts and disbursements method of accounting. On or about the fifteenth day of March, 1921, plaintiff filed with the then Collector of Internal Revenue for said collection district, his Federal income tax return for the calendar year 1920. The tax liability shown on said return was $919,777.86, which amount was duly assessed and paid.

68. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 4):

On or about December 12, 1918, R. B. Mellon, A. W. Mellon, and Henry C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of A. Overholt & Co. and West Overton Distilling Company, each being registered under the Fictitious Names Act of Pennsylvania. True and correct copies of said partnership agreements are attached to the Statement of Claim as Exhibits "A" and "B" and are by reference made a part hereof. In and by said partnership agreements R. B. Mellon, A. W. Mellon, and Henry C. Frick had equal one-third interests in each of said partnerships.

69. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 5):

On or about January 1, 1919, the property and assets of a corporation bearing the name of A. Overholt & Co. were transferred to the partner-

ship of A. Overholt & Co. At or about the same time the property and assets of a corporation bearing the name of West Overton Distilling Company were transferred to the partnership of West Overton Distilling Company. Included in the properties so received by said partnerships were large amounts of spirituous liquors stored in bonded warehouses.

70. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 6):

The business of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company consisted primarily of the storage, bottling and casing, and sale of spirituous liquors. The books and records in respect to the businesses and activities of said partnerships, and each of them, were kept by the accrual method of accounting.

71. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 7):

Henry C. Frick died on or about December 2, 1919. Thereafter and throughout the year 1920 the business of each of the two partnerships of A. Overholt & Co. and West Overton Distilling Company was actively carried on and continued in exactly the same manner as prior to the death of Henry C. Frick. The net income earned by A. Overholt & Co. during the year 1920 in the ordinary course of business was $845,339.86, computed in the following manner:

Gross Income		
Whiskey sales, not less than		$ 928,273.71
Less: January 1, 1920 whiskey inventory	$794,235.38	
December 31, 1920 whiskey inventory	697,307.34	96,928.04
Gross profit on whiskey sales		831,345.67
Sales of empty barrels, not less than		6,609.31
Charges for bottling and casing, not less than		320,533.61
Storage charges, not less than		42,550.50
Other operating income not allocated		33,578.67
Interest received		3,480.73
Rents received		300.00
Total		$1,238,398.49
Deductions		
Salaries and wages	39,600.01	
Insurance	18,190.00	
Taxes	31,132.86	
Storage expense	23,446.60	
Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office	3,519.59	
Cases, bottles, corks, other supplies and misc.	166,749.49	
Loss on Liberty Bonds	5,328.75	
Total		393,058.63
Net income		$ 845,339.86

The net income earned by West Overton Distilling Company during the year 1920 in the ordinary course of business was $158,442.84, computed in the following manner:

GROSS INCOME

Sales less returns		$218,050.31
Less: Inventory December 31, 1919	$121,135.00	
Inventory December 31, 1920	93,819.44	27,315.56
Total		$190,734.75

DEDUCTIONS

Labor	8,188.92
Taxes	2,236.44
Depreciation	1,739.49
Loss on Liberty Bonds	507.50
Storage	1,211.40
Insurance	5,528.16
Other expenses-Bad debts, etc.	11,650.00
Salesmen's commissions	1,230.00
Total	32,291.91
Net income	$158,442.84

72. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 8):

During the year 1920 the sum of $800,000 was distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick by A. Overholt & Co. In

connection with such distributions said parties gave to A. Overholt & Co. non-interest bearing notes in the aggregate amount of $750,000. The amounts so distributed were not intended to be loans from A. Overholt & Co. to said parties. At the time said distributions were made, there was no intention that said parties would pay said notes, and the same were not in fact paid but were returned to the makers thereof in 1925 at the time the property and assets then owned by A. Overholt & Co. and West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick. Said distributions were in fact distributions of a part of the 1920 income of A. Overholt & Co. to said parties. R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick received actual possession of that part of the 1920 income of A. Overholt & Co. represented by said distributions.

73. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 9):

During the period from December 2, 1919, to and including December 31, 1920, the assets of A. Overholt & Co. and West Overton Distilling Company, including cash, were kept separate and were not commingled with the assets or cash of R. B. Mellon or A. W. Mellon.

74. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 10):

On or about March 15, 1921, plaintiff and his brother, R. B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Co. on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and reported that A. Overholt & Co. was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to plaintiff, his brother, R. B. Mellon, and the estate of Henry C. Frick.

75. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 11):

The said return showed gross income of $169,649.13, computed in the following manner:

Sales of empty barrels		$ 6,609.31
Bottling and casing		320,563.61
Storage		42,550.50
Total		$369,693.42
Less: Labor	$ 12,859.41	
Revenue stamps	8,020.90	
Cases, bottles, corks, etc.	150,922.31	

Water and other expenses	10,757.98	
Storage, labor, and exp.	21,264.42	203,825.02
Balance		165,868.40
Interest		3,480.73
Rentals		300.00
Gross income reported		$169,649.13

Deductions of $19,268.15, together with a loss of $5,278.75 from the sale of capital assets or investments shown on said return, resulted in the return showing a net income to be accounted for by the parties interested in A. Overholt & Co. of $145,052.23. $48,350.74 of said amount was reported on the return as distributable and taxable to plaintiff; $48,350.74 of said amount was reported on the return as distributable and taxable to R. B. Mellon; and $48,350.75 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

76. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 12): .....

Although the gross income reported on the return filed for A. Overholt & Co. did not include any amount for profit realized by A. Overholt & Co. on the sale of whiskey, a special schedule attached to said return disclosed that in the year 1920 A. Overholt & Co. realized a profit of $646,327.63 on the sale of whiskey. Such profit is computed in the following manner:

Gross sale price of whiskey		$928,273.71
Less: January 1, 1920 whiskey inventory	$595,676.53	
December 31, 1920 whiskey inventory	498,748.49	96,928.04
Gross profit on whiskey sales		831,345.67
Less: Insurance	16,000.00	
Taxes	3,000.00	
Salesmen's salary and commission	11,726.00	
Storage	23,446.60	
United States taxes paid	9,857.70	
Distillery labor, expense and maintenance	46,791.27	
Salaries	14,302.03	
Bradford office expense	1,809.80	
Office rent and miscellaneous	3,039.02	
Adv. and other expense	55,047.46	
Claim adjustment	1.84	185,021.72
Net profit on whiskey sales		$646,327.63

77. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 13):

> Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Co. on the form prescribed for the making of returns by fiduciaries of a trust.

78. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 14):

On or about March 15, 1921, plaintiff and his brother, R. B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for West Overton Distilling Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and reported that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to plaintiff, his brother, R. B. Mellon, and the estate of Henry C. Frick.

79. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 15):

Said return showed a gross income of $27,735.48, computed in the following manner:

Gross sales	$47,729.00	
Cost of goods sold	20,127.92	27,601.08
Rents received		134.40
Gross income reported		$27,735.48

Deductions of $9,853.84 shown on said return resulted in the return showing a net income to be accounted for by the parties interested in West Overton Distilling Company of $17,881.64. $5,960.55 of said amount was reported on the return as distributable and taxable to plaintiff; $5,960.55 of said amount was reported on the re-

turn as distributable and taxable to R. B. Mellon; $5,960.54 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

80. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 16):

Although a gross income of only $27,735.48 and a net income of only $17,881.64 was reported on the face of said return, balance sheets attached to said return disclose that during the year 1920 the net assets of West Overton Distilling Company were increased, not by $17,881.64, but by $156,539.02, or in the amount of $138,657.38 in excess of the net income shown on the face of the return.

81. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 17):

Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns by fiduciaries of a trust.

82. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 18):

On his Federal income tax return for 1920, plaintiff included $48,350.74 as income from the

partnership of A. Overholt & Co., and included the sum of $5,960.55 as income from the partnership of West Overton Distilling Company.

83. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 19):

In the year 1921, the Commissioner of Internal Revenue caused an examination to be made by an Internal Revenue Agent of the partnership returns filed in the name of and for A. Overholt & Co. and West Overton Distilling Company for the year 1920, and the income tax return filed by plaintiff for the year 1920. On December 20, 1922, the Commissioner mailed to plaintiff a preliminary letter showing a deficiency for 1920 of $180,106.27. On December 16, 1926, the Commissioner mailed to plaintiff a preliminary letter showing a deficiency for the year 1920 of $195,229.70. On February 21, 1927, the Commissioner mailed to plaintiff a final deficiency letter showing a deficiency in income tax for the year 1920 of $190,419.70. On March 19, 1927, said deficiency of $190,419.70, together with interest in the sum of $12,082.52, was assessed against plaintiff. Thereafter, on or about March 23, 1927, the defendant notified plaintiff of said assessment. On or about April 2, 1927, plaintiff paid to defendant said sums of $190,419.70 and $12,082.52.

84. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 20):

In examining the partnership return filed in the names of and for A. Overholt & Co. and West Overton Distilling Company, the Internal Revenue Agent and the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Co. and the 1920 income of West Overton Distilling Company, and merely changed the amount of the incomes so reported. The Commissioner increased plaintiff's share of the net income of A. Overholt & Co. for the year 1920 from $48,350.74 to $281,779.95, by determining that the net income earned by A. Overholt & Co. during the year 1920 was $845,339.86 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $281,779.95 as plaintiff's share thereof. The Commissioner increased plaintiff's share of the net income of West Overton Distilling Company for the year 1920 from $5,960.55 to $52,814.28, by determining that the net income earned by West Overton Distilling Company during the year 1920 was $158,442.84 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $52,814.28 as plaintiff's share thereof.

85. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 21):

On or about January 20, 1923, plaintiff filed with the Commissioner a protest against the action set out in the Commissioner's preliminary letter of December 20, 1922. On January 31, 1927, plaintiff filed with the Commissioner a protest against the

action set forth in the Commissioner's preliminary letter of December 16, 1926. In neither of said protests, nor at any other time, nor in any other manner, prior to the time of filing his claim for refund hereinafter mentioned, did plaintiff assert and claim that the A. Overholt & Co. or West Overton Distilling Company should be treated in any other manner than as partnerships.

86. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 22):

On or about March 19, 1929, plaintiff filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose a claim for refund for the year 1920 of $194,160.75. In said refund claim the said plaintiff assigned the following reasons for the allowance thereof:

In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $281,779.95 and $52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distributions made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on

Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for those years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

87. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 23):

By letter dated April 16, 1932, the Commissioner of Internal Revenue advised plaintiff that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of A. Overholt & Co. and the operating income of West Overton Distilling Company were reportable in the year in which the income was realized. Said letter further advised plaintiff that he would be afforded a hearing before the Income Tax Unit at Washington upon written request therefor. Plaintiff, through counsel, was accorded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter by letter dated February 27, 1934, addressed to A. W. Mellon, the plaintiff was advised "that your proportionate share of the operating profits" of A. Overholt & Co. and West Overton Distilling Company "was properly reportable

on your 1920 return," and that "accordingly, the claim will be disallowed." Plaintiff's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was made by letter dated April 6, 1934, addressed to A. W. Mellon.

88. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 24):

If the income of A. Overholt & Co. for the calendar year 1920 had been treated and reported by plaintiff and his brother, R. B. Mellon, or had been treated by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $551,914.70, computed as follows:

Net income (as set out in Paragraph 7 hereof)		$845,339.86
Less exemption		1,000.00
Net income subject to normal tax		$844,339.86
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $840,339.86	67,227.19	
Surtax on $845,339.86	484,527.51	
Total tax liability	$551,914.70	

If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by plaintiff and R. B. Mellon, or had

been treated by the Commissioner of Internal Revenue as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $66,673.42, computed as follows:

Net income (as set out in Paragraph 7 hereof)		$158,442.84
Less exemption		1,000.00
Net income subject to normal tax		$157,442.84
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $153,442.84	12,275.43	
Surtax on $158,442.84	54,237.99	
Total tax liability	$66,673.42	

No such action was taken by plaintiff or R. B. Mellon, and no income taxes for the year 1920 have been levied or paid on the income earned by A. Overholt & Co. in the year 1920 or on the income earned by West Overton Distilling Company in the year 1920 except the amounts involved in this proceeding and in the related action brought by R. B. Mellon.

89. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 25):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Co. were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets

or property out of which the aforesaid amount of $551,914.70 could have been collected. The amount of money together with the value of the property so received by plaintiff in distribution was equal to or in excess of the amount of $551,914.70.

90. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 26):

> On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $66,673.42 could have been collected. The amount of money together with the value of the property so received by plaintiff in distribution was equal to or in excess of the amount of $66,673.42.

91. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 27):

> The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

92. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 28):

> The partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

93. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 29):

> The partnerships of A. Overholt & Co. and West Overton Distilling Company, and each of them, were in existence throughout the year 1920.

94. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 30):

> A. Overholt & Co. and West Overton Distilling Company were required to and properly filed partnership returns of income on Form 1065 for the year 1920.

95. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 31):

> A. W. Mellon's distributive share of the net income of the partnership of A. Overholt & Co. for the year 1920 was $281,779.95.

96. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 32):

> A. W. Mellon's distributive share of the net

income of the partnership of West Overton Distilling Company for the year 1920 was $52,814.28.

97. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 33):

In determining the deficiency assessed and collected from A. W. Mellon, the Commissioner of Internal Revenue properly included in A. W. Mellon's taxable income for the year 1920 the sum of $281,779.95 as his distributive share of the net income of A. Overholt & Co. for the year 1920.

98. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 34):

In determining the deficiency assessed and collected from A. W. Mellon, the Commissioner of Internal Revenue properly included in A. W. Mellon's taxable income in the year 1920 the sum of $52,814.28 as his distributive share of the net income of West Overton Distilling Company for the year 1920.

99. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 35):

The defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on A. W. Mellon's original position and representation in respect of the manner and method of reporting the income earned by A. Overholt & Co. in the year 1920 and the income earned by

West Overton Distilling Company in the year 1920.

100. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 36):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, the Commissioners of Internal Revenue and the United States are now precluded from assessing and collecting any amounts as the income tax liabilities of said organizations for the year 1920.

101. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 37):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income from property held in trust.

102. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 38):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income of a taxable trust or trusts.

103. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 39):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in

controversy in this action were assessed and collected was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

104. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 40):

Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

105. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 41):

Plaintiff is estopped to assert and claim that the amounts in controversy in this action were not properly assessed by the Commissioner of Internal Revenue and properly collected by the defendant.

106. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 42):

Even though the income, on which the taxes in controversy were asserted, assessed and collected, was income of taxable trusts, as a result of the

distribution of all the properties and assets of A. Overholt & Co. and West Overton Distilling Company and the receipt by A. W. Mellon in such distribution of money and property amounting to in excess of $600,000, at the time the deficiency involved in this proceeding was determined and assessed by the Commissioner of Internal Revenue, and collected by the defendant, A. W. Mellon, was indebted to the United States as a transferee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount collected by the defendant from A. W. Mellon, as hereinbefore set forth.

107. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 43):

Defendant is not indebted to A. W. Mellon in any sum whatsoever.

108. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 1):

Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

109. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 2):

As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

110. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 3):

As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

111. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 4):

Under the provisions of Section 218 of the Revenue Act of 1918, A. W. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

112. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 5):

The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

113. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 6):

> There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

114. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 7):

> There is no warrant in law for the plaintiff's contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until A. W. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

115. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 8):

> The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

116. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 9):

Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

117. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 10):

Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

118. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 11):

Plaintiff is estopped to assert and claim that the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

119. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 12):

Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in

controversy in this action were assessed and collected, was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organization for the year 1920.

120. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 13):

Plaintiff is estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against A. W. Mellon for the year 1920, was not lawfully assessed and legally collected.

121. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 14):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy, was determined, assessed and collected, A. W. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $187,787.17, collected by the defendant from A. W. Mellon as a deficiency in tax and the interest thereon for the year 1920.

122. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 15):

> In equity and good conscience the plaintiff ought not to recover of and from the defendant herein.

123. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 16):

> The taxes sought to be recovered in this action were lawfully assessed and legally collected by the Commissioner of Internal Revenue from A. W. Mellon by the defendant.

124. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 17):

> The pleadings and the evidence in this case, with any inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

125. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 18):

> Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

126. The Court erred in failing and refusing to find as conclusion of law as requested by the defendant that (Conclusion 19):

The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiff's Statement of Claim, at plaintiff's costs.

127. The Court erred in disregarding all of the evidence and in adopting verbatim plaintiff's statement of claim as its findings of fact, to the extent thereof, that is to say, the Court's Findings 2, 3, 4, 5, 6 and 7 are identical with Paragraphs 2, 3, 4, 5, 6 and 7, respectively, of plaintiff's statement of claim; and, in that Finding 8 is identical with Paragraph 9 of the statement of claim except that Exhibits A and B are not made part of the findings; and, in that Findings, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are identical with Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22 and 25, respectively, of plaintiff's statement of claim; and, in that Finding 22 is substantially identical with Paragraph 26 of the statement of claim, and Finding 24 is identical with Paragraph 28 of the statement of claim.

128. The Court erred in failing to rule, prior to conclusion of the trial, on the admissibility of Defendant's Exhibits G. H. R. HH to LLL, and each of them because each and all of said Exhibits, when offered in evidence, were objected to by counsel for plaintiff and the rulings of the Court were either: "Admitted * * * and consideration given to it later"; "will admit it for the present"; "overruled for the present"; "admitted, subject to future ruling"; "admitted temporarily, subject to later ruling"; "ob-

jection overruled for the time being"; objection overruled for the present", or "ruling will be in effect re-served"; that it does not appear by any rulings whether the Court admitted said Exhibits or any thereof in evidence and gave no credence to them in arriving at his findings, conclusions and judgment, or whether the Court excluded said Exhibits and each and every thereof from consideration as not being admissible.

WHEREFORE, defendant prays that the judgment heretofore rendered by the District Court herein be reversed, and that said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's statement of claim and action brought herein.

CHARLES F. UHL,
United States Attorney.

D. LLOYD CLAYCOMB,
Assistant United States Attorney.

Assignment of Errors.

(Filed May 13, 1936.)

No. 6979 Law.

AND Now, to-wit, this 13th day of May, A. D. 1936, comes the defendant D. B. Heiner, individually and as Collector of Internal Revenue for the Twenty-third District of Pennsylvania, by his attorney Charles F. Uhl, United States Attorney in and for the Western

District of Pennsylvania, and, in connection with his appeal, says that in the record, proceedings, findings of fact, conclusions of law, and final judgment in said cause, manifest errors intervene to his prejudice and injury, and he assigns and relies upon the following errors to reverse the judgment entered herein:

1. The Court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant.

2. The Court erred in overruling defendant's motion for judgment upon conclusion of the plaintiff's case.

3. The Court erred in overruling defendant's motion for judgment made and filed at the close of all of the evidence and before submission of the case to the Court.

4. The Court erred in refusing to grant each and every part of the defendant's requests for special findings of fact and conclusions of law.

5. The Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.

6. The Court erred in admitting in evidence, over objection and exception of the defendant, two written agreements dated January 31, 1921, whereby the Union Trust Company of Pittsburgh was appointed so-called liquidating agent with respect to the partnerships A. Overholt & Co. and West Overton Distilling Company,

marked Exhibits C and D attached to plaintiff's statement of claim, for the reason that said instruments are irrelevant and immaterial because they refer to actions of the parties subsequent to 1920; that 1920 is the only tax year involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in the case.

7. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 13 of plaintiff's statement of claim reading as follows:

> 13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that the same is irrelevant and immaterial and is not admitted by the amended affidavit of defense.

8. The Court erred in admitting in evidence, over objection and exception of the defendant, that part of Paragraph 14 of plaintiff's statement of claim reading "During the period of liquidation," in the first line, and the words "liquidating trustees," for the reason that they tender conclusions of law and not statements of fact and are not admitted by the amended affidavit of defense. Said Paragraph 14, as admitted in evidence, reads as follows:

> 14. During the period of liquidation, from December 2, 1919 to and including the year 1925,

no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

9. The Court erred in admitting in evidence, over objection and exception of the defendant the words in Paragraph 16 of plaintiff's statement of claim reading "while acting in the capacity of liquidating trustees" and the words "treating the same as trust properties," for the reason that the same are conclusions of law and and not admitted by the amended affidavit of defense. Said Paragraph 16 as admitted by the Court reads as follows:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

10. The Court erred in admitting, over objection and exception of the defendant, Paragraph 17 of plaintiff's statement of claim, reading as follows:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt

& Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that the same is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose, and not admitted by the amended affidavit of defense.

11. The Court erred in admitting, over defendant's objection and exception, the following portion of Paragraph 18 of plaintiff's statement of claim, with the inclusion of the word "undistributed," for the reason that the same is irrelevant and immaterial and is properly traversed by the amended affidavit of defense. Paragraph 18 as admitted by the Court, with the inclusion of said word, reads as follows:

> 18. In his return for said year 1920, plaintiff * * * included as taxable profit his undistributed share of the so-called * * * profits of A. Overholt & Company in the amount of $48,350.74, and his share of the so-called * * * profits of West Overton Distilling Company in the amount of $5,960.55 * * *.

12. The Court erred in admitting, over objection and exception of the defendant, Paragraph 20 of plaintiff's statement of claim, as follows:

> 20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said

years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that the same is wholly immaterial and irrelevant to any of the issues in this case and is not admitted by the amended affidavit of defense.

13. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 21 of plaintiff's statement of claim, reading as follows:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

"'Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.'"

"'Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.'"

for the reason that the affirmative matter set up by defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of

plaintiff's statement of claim, and for the further reason that in any event said allegations are wholly irrelevant and immaterial.

14. The Court erred in admitting in evidence, over objection and exception of the defendant, Paragraph 22 of plaintiff's statement of claim reading as follows:

> 22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the difference between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 and 1924, inclusive.
> * * *

for the reason that the same is irrelevant and immaterial for the reasons specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that the same is not admitted by said amended affidavit of defense.

15. The Court erred in admitting in evidence, over defendant's objection and exception, Paragraph 23 of plaintiff's statement of claim, reading as follows:

> 23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of $41,008.84 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and pay-

ment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

> " 'Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.' "

for the reason that said Paragraph 23 is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case, and is redundant and is not admitted by the amended affidavit of defense and because the amended affidavit of defense specifically alleges that a claim for refund filed by plaintiff for 1925 was still pending, undisposed of, by the Commissioner of Internal Revenue and that said 1925 claim was based, in part, on the alleged inclusion of 1920 operating profits of the partnerships.

16. The Court erred in admitting in evidence, over objection and exception of the defendant, that

part of Paragraph 28 of plaintiff's statement of claim reading "and has also included said profits in plaintiff's income for 1925," and the last sentence of said Paragraph 28 reading "He has assessed and collected a tax on the same income in each of said years," for the reason that same are irrelevant and immaterial and because the amended affidavit of defense specifically alleges that no final action had yet been taken by the Commissioner with respect to plaintiff's income tax liability for 1925. Said Paragraph 28 as admitted in evidence, with the inclusion of said duly objected to parts, reads as follows:

> 28. The Commissioner of Internal Revenue has included * * * profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

17. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of the witness Hicks, on the ground that the same called for a conclusion of the witness and was not the best evidence, and was leading and suggestive:

> Q. Was that carried on all through the years from 1919 to 1925?
>
> A. Yes.

18. The Court erred in overruling defendant's objection to the following question asked by plaintiff's

counsel of the witness Hicks, and in overruling defendant's motion to strike the following answer thereto:

Q. Was there a profit made out of bottling?

A. There was a profit made on bottling.

for the reason that said question is leading and suggestive.

19. The Court erred in overruling defendant's motion to strike the following answer of the witness Hicks to the following question:

Q. After that what did you do?

A. Decided—the partnership decided not to sell anything unless they could sell the balance of the stock to some one person or concern.

for the reason that said question is not confined to the year 1920, which is the only year in issue in this case.

20. The Court erred in overruling defendant's objection to the following questions, and in allowing the same to be answered by the witness Hicks:

Q. In 1921—or until the final sale in 1925, had you any negotiations with anyone as to the sale of the entire plant?

A. We had several inquiries. Mr. Rosensteel —I think that was in 1922, but he made us no real offer; and Mr. Pell—

Q. Mr. Pell of New York, a broker, finally made the sale?

A. Yes.

Q. And prior to the final sale had he introduced you to any other purchaser?

A. Yes, he had.

for the reason that the same are irrelevant and immaterial.

21. The Court erred in overruling the objection of the defendant to the following question, and in allowing the same to be answered by witness Hicks:

> Q. Was there any distribution of profits or of any money realized from the sale of whiskey made to the surviving partners or the estate of the deceased partner up until the year 1925?
>
> A. No, sir.

for the reason that said question calls for a conclusion of the witness, is incompetent, irrelevant and immaterial and not the best evidence.

22. The Court erred in overruling defendant's objection to the following question, and in allowing it to be answered:

> Q. Mr. Hicks, in 1920 were there any discussions in Washington by Government officials relating to the whiskey business which might result in the expenditure of a large amount of money by distillers?
>
> A. Yes.

for the reason that the same is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues involved in the case, and for the further reason that the testimony or the proof offered is too general and does not establish or tend to establish the question of whether or not there were debts and contingent liabilities, or the amounts of them, and for the further reason that the offer of proof is not a ten-

der of an issue of fact but a tender of an issue of law, and has no bearing whatsoever upon the right of the Government to levy and collect a tax for the year 1920.

23. The Court erred in refusing to sustain defendant's objection to the following questions and in overruling defendant's motion to strike the following answers thereto of the witness Hicks:

Q. Mr. Hicks, how much whiskey was there on hand in 1920?

A. It would be pretty hard to state just exactly the amount, but I would say around sixty thousand in the two distilleries.

Q. Barrels?

A. Yes.

for the reason that such testimony is not the best evidence and that the question is not confined to a specific time.

24. The Court erred in overruling defendant's motion to strike the answer of plaintiff's witness Seifert to the following question:

Q. Were you in 1920 attorney for Messrs. A. W. and R. B. Mellon in conjunction with the A. Overholt & Company and West Overton Distilling Company?

A. Mr. James H. Beal, former partner of Reed, Smith, Shaw & Beal, and myself were counsel for liquidating trustees of A. Overholt & Company and the West Overton Distilling Company during the year 1920.

for the reason that the answer was not responsive to the question.

25. The Court erred in overruling defendant's objection to the following question, and in allowing the same to be answered by the witness Seifert:

> Q. When there did you hear any rumors, definite or otherwise, in regard to certain proposed policies which the Government might adopt in regard to imposition of a floor tax on whiskey, in regard to the requiring the removal of all whiskey to concentration warehouses, and in regard to requiring all whiskey to be bottled immediately?
>
> A. I did.

for the reason that said question is argumentative, is incompetent, irrelevant and immaterial, and calls for a conclusion of the witness and is too general.

26. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered, and in overruling defendant's motion to strike said answer thereto:

> Q. Did you as attorney for Messrs. A. W. and R. B. Mellon advise them or their associate in regard to the distribution of profits or of the profits from the sale of whiskey of the two former partnerships, A. Overholt & Company and West Overton Distilling Company?
>
> A. As counsel with Mr. James H. Beal, we advised Mr. R. B. Mellon, who was the managing partner of A. Overholt & Company, partnership—

managing partner of the surviving partners, A. W. Mellon and R. B. Mellon, of the West Overton Distilling Company and A. Overholt & Company, that no distribution could be made until certain questions had been settled—as definitely as we as counsel could advise them—about a possible floor tax, possible expense and tax involved in removing the whiskey to Government warehouses, should the Government require that, possible tax and expense involved in bottling the whiskey which was then in the distilleries at West Overton and A. Overholt & Company's plant at Broadford.

for the reason that the question is irrelevant and immaterial and not binding on the defendant and, with respect to the motion to strike, for the reason that the answer is not responsive but is argumentative and invades the province of the Court, and does not tend to prove or disprove any issue involved in this case.

27. The Court erred in overruling defendant's motion to strike the following question and answer thereto of the witness Seifert:

Q. Would these matters have involved any amount of money, if they had been adopted by the Government?

A. They would have involved very large sums of money, sums of money larger than the company at that time would have been—or sums larger than the surviving partners at that time would have been able to have taken care of out of the then assets of the partnership.

for the reason that the question calls for a conclusion of the witness and the answer is a conclusion, and neither tends to prove or disprove any issue in the case.

28. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing it to be answered:

> Q. Did the fact that a tax might be assessed on all whiskey, either as a floor tax or as an Internal Revenue tax upon bottling, enter into your consideration in giving your advice to Messrs. A. W. and R. B. Mellon?
>
> A. It certainly did.

for the reason that the same is incompetent, irrelevant and immaterial.

29. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following questions:

> Q. Do you personally know whether the Commissioner declared a deficiency in income tax against the two corporations for any of the years 1916, '17 or '18?
>
> A. I know that the Commissioner—
>
> Q. Just answer whether you know or not.
>
> A. If you mean by "asserting deficiency" proposing deficiency in letters which were addressed to the corporations, I will answer that question yes.

for the reason that the answer is not responsive.

30. The Court erred in overruling defendant's objection to the following questions asked of the witness Seifert, and in allowing the same to be answered:

Q. Approximately what do they amount to?

A. About $550,000 for the years '16, '17 and '18.

for the reason that it is immaterial and irrelevant to the issues involved in this case what deficiencies may have been asserted or determined prior to the year 1920.

31. The Court erred in overruling defendant's objection to the following question asked of the witness Seifert, and in allowing the same to be answered:

Q. When that distribution was made, did you or did you not advise them with respect to the unpaid income taxes and whether or not any part should be retained to meet those payments when they were demanded.

A. Yes, sir.

for the reason that the same is incompetent, irrelevant and immaterial, as well as leading.

32. The Court erred in overruling defendant's motion to strike the following question and answer with respect to the witness Seifert:

Q. What was your advice to the surviving partners in the year 1925?

A. Our advice was that no distribution of any of the assets of the partnership could be made until all debts had been discharged and all possible contingent liabilities disposed of.

for the reason that the same is incompetent, irrelevant, immaterial and, in any event, the answer is not responsive to the question and cannot bind the defendant.

33. The Court erred in overruling defendant's motion to strike the answer of the witness Seifert to the following question:

Q. In the year 1925, I mean.

A. In the year 1925, as the assets had been disposed of in bulk, we advised that distribution could then be made of everything except what might be necessary to take care of undisposed of Federal income and excess profits tax liabilities.

for the reason that the same is immaterial and incompetent.

34. The Court erred in overruling defendant's motion to strike the entire testimony of plaintiff's witness Seifert, for the reason that said testimony does not prove or tend to prove any issue involved in this case; the testimony is argumentative, an expression of conclusions by the witness, and is incompetent, irrelevant and immaterial.

35. The Court erred in refusing to admit in evidence, as an admission by plaintiff because of insufficient denial thereof, the following portion of Paragraph 11 of defendant's second defense to plaintiff's statement of claim and in sustaining plaintiff's objection thereto:

11. The defendant, the Commissioner of Internal Revenue, and the United States relied to

their prejudice on plaintiff's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company.

36. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of the following offer of proof by defendant's witness Updike, after being duly qualified:

The result of a computation of the tax of the plaintiff for the year 1925, in accordance with Bureau letter dated March 15, 1929, in evidence, eliminating yearly gains and losses for the period from December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income which would show that plaintiff underpaid his tax for the year 1925, admitting for said purpose everything contended for by plaintiff. It was offered to rebut plaintiff's allegation in Paragraph 28 of its statement of claim that there resulted, by reason of the assertion of a deficiency for 1925, double taxation on the same income, namely, for 1920 and 1925, defendant offered to show by this computation and proof that there has been no double taxation; that such computation was also offered in rebuttal of the latter allegation in the statement of claim. The Court was advised that said Paragraph 28 of the statement of claim was one of the paragraphs to which defendant made objection on the ground that it is irrelevant and immaterial and on which defendant says that if the Court

decides adversely to defendant's contention in that respect, then defendant is left without any proof rebutting the inference of the allegation in the statement of claim. The Court was also advised that the proof would show that, taking the amount determined by the Commissioner as the amount for 1925, which plaintiff now contends included the incomes for 1920 and the incomes and losses for the intervening years, that defendant proposed to deduct those amounts in this computation and to show that the tax on the remainder amounts to more than the plaintiff claims he is entitled to have refunded for 1925.

37. The Court erred in refusing to admit in evidence, and in sustaining plaintiff's objection thereto, of defendant's offer to prove by the witness Updike that a computation of the tax of R. B. Mellon for 1925, in accordance with Bureau letter dated March 15, 1929, eliminating yearly gains and losses for the period December 1, 1919 to December 31, 1924, and taking the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, will show that the plaintiff R. B. Mellon has underpaid his tax for the year 1925 in the amount of $48,232,62.

38. The Court erred in allowing the witness Banks to answer, over defendant's objection, the following question interposed by plaintiff's counsel during re-direct examination:

Q. Were there additional repayments in the year 1922?

A. In the year 1922 the ledger account shows $90,000 repaid to the partnership by the individuals.

39. The Court erred in not ruling, prior to conclusion of the trial, on the admissibility of the testimony of the witness Banks, because all of his testimony was objected to by plaintiff and parts objected to by defendant and all of the Court's ruling were: "overruled for the present"; that it does not appear by any rulings whether the Court considered the witness's testimony as admitted and disbelieved by him or excluded consideration of said testimony in arriving at his findings, conclusions and judgment.

40. The Court erred in admitting in evidence, over defendant's objection and exception, Plaintiff's Exhibit No. 5, being a certified copy of decree of the Orphans' Court of Allegheny County, entered December 24, 1931, respecting final distribution of the Estate of Henry C. Frick, for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issues involved in this case. It is mere hearsay and is not binding on the defendant and not proper rebuttal.

41. The Court erred in overruling defendant's objection to the following question asked by plaintiff's counsel of its rebuttal witness Buchanan, and in allowing the same to be answered:

Q. In connection with income and estate tax on the Estate of Henry C. Frick, did you have up with the Bureau of Internal Revenue at Washing-

ton the question of the taxes growing out of the liquidation of A. Overholt & Company and the West Overton Distilling Company?

A. I did.

for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issue involved in the case, and is not proper rebuttal testimony and for the further reason that the basis for computing the gain or loss in connection with arriving at the income tax due from an estate is on a different basis and under a different statute entirely from that involving individuals, and the basis of values is entirely different; and this offer of testimony has no relevancy or materiality to any of these issues. The Estate of Henry C. Frick is not a party to this proceeding, and is not involved, and any action that the Commissioner may have taken with reference to that taxpayer, if it should be erroneous, does not preclude the Commissioner from taking a correct action against some other taxpayer.

42. The Court erred in overruling defendant's objection to the following question asked by plaintiff of his rebuttal witness Buchanan, and in allowing the same to be answered:

Q. When was the settlement made with the Bureau of Internal Revenue in connection with Mr. Frick's income taxes on this liquidation?

A. In the year 1928.

for the same reasons as given in support of the immediately previous objection.

43. The Court erred in admitting in evidence, over defendant's objection and exception, plaintiff's Exhibit No. 6, being a copy of a letter addressed to the witness Buchanan as counsel for the Estate of Henry C. Frick, covering the income tax liability of the Frick Estate from December 3, 1919 to the end of 1923, for the reason that the same is not the original and is incompetent, irrelevant and immaterial, and for the further reasons assigned in support of the two immediately preceding objections.

44. The Court erred in overruling defendant's objection to the following question and in allowing the same to be answered by plaintiff's witness Buchanan, and in overruling defendant's motion to strike the following answer thereto as not being responsive and being incompetent, irrelevant and immaterial:

> Q. That is what I meant. And did you reach any understanding or agreement with respect to settlement on that basis?
>
> A. Before or in the course of the hearings on the question of A. Overholt & Company income in Washington, in the case of the Estate of H. C. Frick, I conferred with Mr. Seifert as attorney for the other partners of that firm, and I was authorized by Mr. Seifert to say that the ruling made in the case of the Estate of H. C. Frick could be made also in the cases of the other two partners, which had not yet been reached in audit, as I understood. I so advised the conference in Washington.

45. The Court erred in overruling defendant's objections to the following questions asked by plaintiff of the witness Buchanan, and in allowing the same to be answered:

Q. What was the ruling in 1925—as to 1925 income?

A. Shall I read into the record the ruling?

Q. Yes.

A. The ruling for 1925 is somewhat lengthy. It begins this way: "The following adjustments have been made in net capital gain as set up in Exhibit 'B' revised"—Perhaps I can show it to the attorney for the United States and have it copied into the record instead of reading all these figures.

for the same reasons as noted in support of the four immediately previous objections.

46. The Court erred in overruling defendant's objection to the following questions asked of the witness Buchanan, and in allowing the same to be answered:

Q. Well, can you give us the effect of that ruling?

A. The amount received by the estate in 1925—

Q. Just a moment. I mean the basis for the ruling; can you give that?

A. That is what I am trying to give. The amount received by the estate in liquidation in 1925 was shown, and the cost of the decedent's interest based on an amended balance sheet of

December 2, 1919, and giving effect to adjustments made in the audit of the 1918 return, was shown; a comparison of those two figures showed a profit. A similar comparison in the case of the West Overton Distilling Company showed a profit; and these profits were shown in net capital gain. I would like to make this explanation, however: that this was not the final letter received by the Estate of H. C. Frick, which did not come until February of 1928. On account of other adjustments in tax liability, the taxpayer did not elect to take advantage of capital gain rates, because there would be no advantage in doing so, and therefore the ultimate tax was not at capital gain rates.

for the reason that the questions call for a conclusion of the witness.

47. The Court erred in overruling defendant's motion to strike all the testimony of plaintiff's rebuttal witness Buchanan for the reason that the same is incompetent, irrelevant, and immaterial, hearsay, and not binding on the defendant, and not proper rebuttal testimony, not tending to prove or disprove any issue involved in this case.

48. The Court erred in finding as a matter of fact that (Finding No. 5):

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined

in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $175,259.70 was disclosed. Said additional tax for the year 1920 was the result of the Commissioner adding to plaintiff's income profits alleged to have been realized in that year from the sale of whiskey.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is vague, indefinite, misleading and contrary to the undisputed evidence, in that, as shown by defendant's Exhibit F, said letter of February 21, 1927 was a sixty-day deficiency letter advising plaintiff that there appeared to be a deficiency in tax for 1920 of $175,259.70 and advising him of his right to appeal from said determination by the filing of his petition with the Board of Tax Appeals within sixty days, and that said tentative determination of deficiency resulted from the Commissioner including in plaintiff's individual income his distributive share in the net income of the partnerships A. Overholt & Company and West Overton Distilling Company, with the inclusion in the net income of said partnerships of profit on sales of whiskey by each of said partnerships, which profit plaintiff had omitted in his individual income tax return for 1920.

49. The Court erred in finding as a matter of fact that (Finding No. 6):

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commission-

er had assessed the deficiency in tax of $175,259.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $175,259.70 together with interest thereon of $12,527.47, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

for the reason that there is no substantial evidence in the record to support said finding, in that there is no evidence respecting the collection of said deficiency assessment under threats or duress. The evidence clearly shows that payment of said assessment was voluntarily made.

50. The Court erred in finding as a matter of fact that (Finding No. 7):

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $175,259.70 and $12,527.47

for the reason that there is no substantial evidence in the record to support said finding.

51. The Court erred in finding as a matter of fact that (Finding No. 9):

9. The aforesaid two partnerships were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever exist-

ed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

for the reason that there is no substantial evidence in the record to support said finding.

52. The Court erred in finding as a matter of fact that (Finding No. 10):

10. Immediately after the dissolution of the partnerships as aforesaid, the surviving partners began the liquidation of the two partnerships, and since that time, December 2, 1919, until January 31, 1921, acted in respect to the assets and businesses of the said two former partnerships as liquidating trustees. By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh, liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached to the statement of claim, made part thereof, and marked Exhibits "C" and "D", respectively.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 11 of plaintiff's statement of claim, the latter portion of which paragraph was duly denied by defendant in his amended affidavit of defense.

53. The Court erred in finding as a matter of fact that (Finding No. 11):

11. The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 12 of plaintiff's statement of claim which specifically denies said paragraph and alleges that said partnerships' books and records for the year 1920 were kept by the accrual method of accounting.

54. The Court erred in finding as a matter of fact that (Finding 12):

12. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 13 of plaintiff's statement of claim, which paragraph is not admitted by the defendant's amended affidavit of defense.

55. The Court erred in finding as a matter of fact that (Finding No. 13):

13. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees, or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trus-

tees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 14 of plaintiff's statement of claim, which is duly traversed by Paragraph 14 of defendant's amended affidavit of defense.

56. The Court erred in finding as a matter of fact that (Finding No. 14):

14. On December 2, 1919 and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid or satisfied.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial and contrary to the undisputed evidence, in that the testimony of defendant's witness Banks relative to the books of the A. Overholt & Company and defendant's Exhibit MMM, being copy of accounts receivable of the A. Overholt & Company, showed distributions in fact to have been made by the A. Overholt & Company to A. W. and R. B. Mellon and the Frick Estate during 1920.

57. The Court erred in finding as a matter of fact that (Finding No. 15):

> 15. Plaintiff and A. W. Mellon, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

for the reason that there is no substantial evidence in the record to support said finding and that said finding is identical in language with Paragraph 16 of plaintiff's statement of claim, which is not admitted by defendant's amended affidavit of defense.

58. The Court erred in finding as a matter of fact that (Finding 16):

> 16. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the year 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding is wholly immaterial, as specifically set forth in Paragraph 17 of the defendant's amended affidavit of defense.

59. The Court erred in finding as a matter of fact that (Finding No. 17):

> 17. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28, respectively.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 17 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 17 of defendant's amended affidavit of defense.

60. The Court erred in finding as a matter of fact that (Finding No. 18):

> 18. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is substantially identical in language with Paragraph 20 of plaintiff's statement of claim, is wholly immaterial as speci-

fically set forth in Paragraph 20 of defendant's amended affidavit of defense.

61. The Court erred in finding as a matter of fact that (Finding No. 19):

> 19. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:
>
> > "Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.
> >
> > "Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925."

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 21 of plaintiff's statement of claim, is wholly immaterial, as specifically set forth in Paragraph 21 of defendant's amended affidavit of defense.

62. The Court erred in finding as a matter of fact that (Finding No. 20):

> 20. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received

in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 22 of plaintiff's statement of claim, is wholly immaterial as specifically set forth in Paragraph 22 of defendant's amended affidavit of defense, and for the further reason that said finding is contrary to the undisputed evidence, in that, after defendant with leave of Court amended his amended affidavit of defense so as to specifically deny the allegations of the second sentence of said Paragraph 22 in the statement of claim, being identical with the second sentence of the Court's finding No. 20, and it was shown by the testimony of the witness Banks and by defendant's Exhibit MMM that the amounts actually received in liquidation in 1925 did not include the amounts distributed during 1920 and succeeding years immediately prior to final liquidation of said partnerships.

63. The Court erred in finding as a matter of fact that (Finding No. 21):

21. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of said sums of $175,259.70 and $12,527.47 interest, on the ground that said additional tax for the year 1920, the interest thereon, and the assessment and

collection thereof were in all respects illegal and void, for the reasons hereinbefore stated.

for the reason that there is no substantial evidence in the record to support said finding and for the further reason that said finding, which is identical in language with Paragraph 25 of plaintiff's statement of claim, is duly traversed by Paragraph 25 of defendant's amended affidavit of defense.

64. The Court erred in finding as a matter of fact that (Finding No. 23):

23. The sum received from the sale of whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding is wholly immaterial.

65. The Court erred in finding as a matter of fact that (Finding No. 24):

24. The Commissioner of Internal Revenue has included liquidating profits of $281,779.95 and $52,814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said liquidating profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

for the reason that there is no substantial evidence in the record to support said finding, and for the further reason that said finding, which is identical in language with Paragraph 28 of plaintiff's statement of claim, is wholly immaterial for the reasons specifically set forth in Paragraph 28 of defendant's amended affidavit of defense.

66. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 1):

> The praecipe for summons in this action was filed on March 23, 1932, and the Statement of Claim herein was filed on October 24, 1933, by R. B. Mellon, a resident of the City of Pittsburgh, Allegheny County, Pennsylvania. The said R. B. Mellon died testate on or about December 1, 1933, and the duly qualified executors and executrices of his estate are Jennie King Mellon, Richard King Mellon and Sarah Mellon Scaife, all residents of Pittsburgh, Pennsylvania, and the Union Trust Company of Pittsburgh, a corporation doing business in Pittsburgh, Pennsylvania, all of whom by order of Court have been substituted as parties plaintiff herein.

67. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 3):

> During the year 1920, R. B. Mellon kept his books and records and filed his income tax return for said year on the cash receipts and disburse-

ments method of accounting. On or about the fifteenth day of March, 1921, R. B. Mellon filed with the then Collector of Internal Revenue for said collection district, his Federal income tax return for the calendar year 1920. The tax liability shown on said return was $406,673.28, which amount was duly assessed and paid.

68. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 4):

On or about December 12, 1918, R. B. Mellon, A. W. Mellon, and Henry C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of A. Overholt & Co. and West Overton Distilling Company, each being registered under the Fictitious Names Act of Pennsylvania; true and correct copies of said partnership agreements are attached to the Statement of Claim as Exhibits "A" and "B" and are by reference made a part hereof. In and by said partnership agreements R. B. Mellon, A. W. Mellon and Henry C. Frick had equal one-third interests in each of said partnerships.

69. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 5):

On or about January 1, 1919, the property and assets of a corporation bearing the name of A. Overholt & Co. were transferred to the partnership of A. Overholt & Co. At or about the same time

the property and assets of a corporation bearing the name of West Overton Distilling Company were transferred to the partnership of West Overton Distilling Company. Included in the properties so received by said partnerships were large amounts of spirituous liquors stored in bonded warehouses.

70. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 6):

The business of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company consisted primarily of the storage, bottling and casing, and sale of spirituous liquors. The books and records in respect to the businesses and activities of said partnerships, and each of them, were kept by the accrual method of account.

71. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 7):

Henry C. Frick died on or about December 2, 1919. Thereafter and throughout the year 1920 the business of each of the two partnerships of A. Overholt & Co. and West Overton Distilling Company was actively carried on and continued in exactly the same manner as prior to the death of Henry C. Frick. The net income earned by A. Overholt & Co. during the year 1920 in the ordinary course of business was $845,339.86, computed in the following manner:

Gross Income		
Whiskey sales, not less than		$928,273.71
Less: January 1, 1920 whiskey inventory	$794,235.38	
December 31, 1920 whiskey inventory	697,307.34	96,928.04
Gross profit on whiskey sales		831,345.67
Sales of empty barrels, not less than		6,609.31
Charges for bottling and casing, not less than		320,533.61
Storage charges, not less than		42,550.50
Other operating income not allocated		33,578.67
Interest received		3,480.73
Rents received		300.00
Total		$1,238,398.49
Deductions		
Salaries and wages	39,600.01	
Insurance	18,190.00	
Taxes	31,132.86	
Storage expense	23,446.60	
Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office	3,519.59	

Cases, bottles, corks, other supplies and misc.....	166,749.49	
Loss on Liberty Bonds....	5,328.75	
Total		393,058.63
Net income		$845,339.86

The net income earned by West Overton Distilling Company during the year 1920 in the ordinary course of business was $158,442.84, computed in the following manner:

Gross Income

Sales less returns		218,050.31
Less: Inventory December 31, 1919	$121,135.00	
Inventory December 31, 1920	93,819.44	27,315.56
Total		$190,734.75

Deductions

Labor	8,188.92	
Taxes	2,236.44	
Depreciation	1,739.49	
Loss on Liberty Bonds....	507.50	
Storage	1,211.40	
Insurance	5,528.16	
Other expenses—Bad debts, etc.	11,650.00	
Salesmen's commissions..	1,230.00	
Total		32,291.91
Net income		$158,442.84

72. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 8)—

> During the year 1920 the sum of $800,000 was distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick by A. Overholt & Co. In connection with such distributions said parties gave to A. Overhold & Co. non-interest bearing notes in the aggregate amount of $750,000. The amounts so distributed were not intended to be loans from A. Overholt & Co. to said parties. At the time said distributions were made, there was no intention that said parties would pay said notes and the same were not in fact paid but were returned to the makers thereof in 1925 at the time the property and assets then owned by A. Overholt & Co. and West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick. Said distributions were in fact distributions of a part of the 1920 income of A. Overholt & Co. to said parties. R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick received actual possession of that part of the 1920 income of A. Overholt & Co. represented by said distributions.

73. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 9):

> During the period from December 2, 1919, to and including December 31, 1920, the assets of A. Overholt & Co. and West Overton Distilling Com-

pany, including cash, were kept separate and were not commingled with the assets or cash of R. B. Mellon or A. W. Mellon.

74. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 10):

On or about March 15, 1921, R. B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Co. on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and reported that A. Overholt & Co. was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to R. B. Mellon, his brother, A. W. Mellon, and the estate of Henry C. Frick.

75. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 11):

The said return showed gross income of $169,649.13, computed in the following manner:

Sales of empty barrels....	$ 6,609.31
Bottling and casing	320,563.61
Storage	42,550.50
Total	369,693.42

Less: Labor	$ 12,859.41	
Revenue stamps	8,020.90	
Cases, bottles, corks, etc.	$150,922.31	
Water and other expenses	10,757.98	
Storage, labor, and exp.	21,264.42	203,825.02
Balance		$165,868.40
Interest		3,480.73
Rentals		300.00
Gross income reported		169,649.13

Deductions of $19,268.15, together with a loss of $5,278.75 from the sale of capital assets or investments shown on said return, resulted in the return showing a net income to be accounted for by the parties interested in A. Overholt & Co. of $145,-$52.23. $48,350.74 of said amount was reported on the return as distributable and taxable to R. B. Mellon; $48,350.74 of said amount was reported on the return as distributable and taxable to A. W. Mellon; and $48,350.75 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

76. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 12):

Although the gross income reported on the return filed for A. Overholt & Co. did not include any amount for profit realized by A. Overholt &

Co. on the sale of whiskey, a special schedule attached to said return disclosed that in the year 1920 A. Overholt & Co. realized a profit of $646,327.63 on the sale of whiskey. Such profit is computed in the following manner:

Gross sale price of whiskey			$928,273.71
Less: January 1, 1920 whiskey inventory	$595,676.53		
December 31, 1920 whiskey inventory	498,748.49		96,928.04
Gross profit on whiskey sales			831,345.67
Less: Insurance		16,000.00	
Taxes		3,000.00	
Salesmen's salary & commission		11,726.00	
Storage		23,446.60	
United States taxes paid		9,857.70	
Distillery labor, expense and mainteance		46,791.27	
Salaries		14,302.03	
Bradford office expense		1,809.80	
Office rent and miscellaneous		3,039.02	
Adv. and other expense		55,047.46	
Claim adjustment		1.84	185,021.72
Net profit on whiskey sales.			$646,327.63

77. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 13):

> Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Co. on the form prescribed for the making of returns by fiduciaries of a trust.

78. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 14):

> On or about March 15, 1921, R. B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for West Overton Distilling Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and reported that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to R. B. Mellon, his brother, A. W. Mellon, and the estate of Henry C. Frick.

79. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 15):

Said return showed a gross income of $27,735.48, computed in the following manner:

Gross sales	$47,729.00	
Cost of goods sold	20,127.92	$27,601.08
Rents received		134.40
Gross income reported		$27,735.48

Deductions of $9,853.84 shown on said return resulted in the return showing a net income to be accounted for by the parties interested in West Overton Distilling Company of $17,881.64. $5,960.55 of said amount was reported on the return as distributable and taxable to R. B. Mellon; $5,960.55 of said amount was reported on the return as distributable and taxable to A. W. Mellon; $5,960.54 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

80. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 16):

Although a gross income of only $27,735.48 and a net income of only $17,881.64, was reported on the face of said return, balance sheets attached to said return disclose that during the year 1920 the net assets of West Overton Distilling Company were increased, not by $17,881.64, but by $156,539.02, or in the amount of $138,657.38 in excess of the net income shown on the face of the return.

81. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 17):

> Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns by fiduciaries of a trust.

82. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 18):

> On his Federal income tax return for 1920 R. B. Mellon included $48,350.74 as income from the partnership of A. Overholt & Co., and included the sum of $5,960.55 as income from the partnership of West Overton Distilling Company.

83. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 19):

> In the year 1921, the Commissioner of Internal Revenue caused an examination to be made by an Internal Revenue Agent of the partnership returns filed in the name or and for A. Overholt & Co. and West Overton Distilling Company for the year 1920, and the income tax return filed by R. B. Mellon for the year 1920. On December 20, 1922, the Commissioner mailed to R. B. Mellon a preliminary letter showing a deficiency for 1920 of $174,422.45. On December 16, 1926, the Commis-

sioner mailed to R. B. Mellon a preliminary letter showing a deficiency for the year 1920 of $181,298.64. On February 21, 1927, the Commissioner mailed to R. B. Mellon a final deficiency letter showing a deficiency in income tax for the year 1920 of $175,259.70. On May 5, 1927, said deficiency of $175,259.70, together with interest in the sum of $12,527.47, was assessed against R. B. Mellon. Thereafter, on or about May 10, 1927, the defendant notified R. B. Mellon of said assessment. On or about May 19, 1927, R. B. Mellon paid to defendant said sums of $175,259.70 and $12,527.47.

84. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 20):

In examining the partnership return filed in the names of and for A. Overholt & Co. and West Overton Distilling Company, the Internal Revenue Agent and the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Co. and the 1920 income of West Overton Distilling Company, and merely changed the amount of the incomes so reported. The Commissioner increased R. B. Mellon's share of the net income of A. Overholt & Co. for the year 1920 from $48,350.74 to $281,779.95, by determining that the net income earned by A. Overholt & Co. during the year 1920 was $845,339.86 (as set out in Paragraph 7 hereof), and taking one-third of said amount or $281,779.95 as R. B. Mellon's share thereof. The Commissioner increased R. B. Mel-

lon's share of the net income of West Overton Distilling Company for the year 1920 from $5,960.55 to $52,814.28, by determining that the net income earned by West Overton Distilling Company during the year 1920 was $158,442.84 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $52,814.28 as R. B. Mellon's share thereof.

85. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 21):

> On or about January 19, 1923, R. B. Mellon filed with the Commissioner a protest against the action set out in the Commissioner's preliminary letter of December 20, 1922. On January 31, 1927, R. B. Mellon filed with the Commissioner a protest against the action set forth in the Commissioner's preliminary letter of December 16, 1926. In neither of said protests, nor at any other time, nor in any other manner, prior to the time of filing his claim for refund hereinafter mentioned, did R. B. Mellon assert and claim that the A. Overholt & Co. or West Overton Distilling Company should be treated in any other manner than as partnerships.

86. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 22):

> On or about March 19, 1929, R. B. Mellon filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that pur-

pose a claim for refund for the year 1920 of $187,787.17, to-wit, the aforesaid sum of $175,259.70 additional tax and $12,527.47 interest. In said refund claim the said R. B. Mellon assigned the following reasons for the allowance thereof:

> In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $281,779.95 and $52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners' individual incomes for these years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

87. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 23):

> By letter dated April 16, 1932, the Commissioner of Internal Revenue advised R. B. Mellon that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of A. Overholt & Co. and the operating income of West Overton Distilling Company were reportable in the year in which the income was realized. Said letter further advised R. B. Mellon that he would be afforded a hearing before the Income Tax Unit at Washington upon written request therefor. R. B. Mellon, through counsel, was accorded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter by letter dated February 27, 1934, addressed to the Estate of R. B. Mellon, the plaintiffs were advised "that Mr. Mellon's proportionate share of the operating profits" of A. Overholt & Co. and West Overton Distilling Company "was properly reportable in his 1920 return," and that "Accordingly, the claim will be disallowed." R. B. Mellon's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was made by letter dated April 6, 1934, addressed to the Estate of R. B. Mellon.

88. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 24):

If the income of A. Overholt & Co. for the calendar year 1920 had been treated and reported by R. B. Mellon and A. W. Mellon, or had been treated by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $551,914.70, computed as follows:

Net Income (as set out in Paragraph 7 hereof)		$845,339.86
Less exemption		1,000.00
Net income subject to normal tax		$844,339.86
Normal tax at 4% on $4,000	160.00	
Normal tax at 8% on $840,339.86	67,227.19	
Surtax on $845,339.86	484,527.51	
Total tax liability		$551,914.70

If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by R. B. Mellon and A. W. Mellon, or had been treated by the Commissioner of Internal Revenue as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $66,673.42, computed as follows:

Net income (as set out in Paragraph 7 hereof)	$158,442.84
Less exemption	1,000.00
Net income subject to normal tax	$157,442.84

Normal tax at 4% on $4,000. .	$ 160.00
Normal tax at 8% on $153,442.84	12,275.43
Surtax on $158,442.84	54,237.99
Total tax liability	$66,673.42

No such action was taken by R. B. Mellon or A. W. Mellon, and no income taxes for the year 1920 have been levied or paid on the income earned by A. Overholt & Co. in the year 1920 or on the income earned by West Overton Distilling Company in the year 1920 except the amounts involved in this proceeding and in the related action brought by R. B. Mellon.

89. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 25):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Co. were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $551,914.70 could have been collected. The amount of money together with the value of the property so received by R. B. Mellon in distribution was equal to or in excess of the amount of $551,914.70.

90. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 26):

On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $66,673.42 could have been collected. The amount of money together with the value of the property so received by R. B. Mellon in distribution was equal to or in excess of the amount of $66,673.42.

91. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 27):

The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the Estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

92. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 28):

The partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

93. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 29):

The partnerships of A. Overholt & Co. and West Overton Distilling Company, and each of them, were in existence throughout the year 1920.

94. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 30):

A. Overholt & Co. and West Overton Distilling Company were required to and properly filed partnership returns of income on Form 1065 for the year 1920.

95. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 31):

R. B. Mellon's distributive share of the net income of the partnership of A. Overholt & Co. for the year 1920 was $281,779.95.

96. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 32):

R. B. Mellon's distributive share of the net income of the partnership of West Overton Distilling Company for the year 1920 was $52,814.28.

97. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 33):

In determining the deficiency assessed and collected from R. B. Mellon, the Commissioner of In-

ternal Revenue properly included in R. B. Mellon's taxable income for the year 1920 the sum of $281,779.95 as his distributive share of the net income of A. Overholt & Co. for the year 1920.

98. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 34):

In determining the deficiency assessed and collected from R. B. Mellon, the Commissioner of Internal Revenue properly included in R. B. Mellon's taxable income in the year 1920 the sum of $52,814.28 as his distributive share of the net income of West Overton Distilling Company for the year 1920.

99. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 35):

The defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income earned by A. Overholt & Co. in the year 1920 and the income earned by West Overton Distilling Company in the year 1920.

100. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 36):

If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, the

Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any amounts as the income tax liabilities of said organizations for the year 1920.

101. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 37):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income from property held in trust.

102. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 38):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income of a taxable trust or trusts.

103. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 39):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

104. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 40):

Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes

in controversy in this action were assessed and collected was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

105. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 41):

Plaintiffs are estopped to assert and claim that the amounts in controversy in this action were not properly assessed by the Commissioner of Internal Revenue and properly collected by the defendant.

106. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 42):

Even though the income on which the taxes in controversy were asserted, assessed and collected was income of taxable trusts, as a result of the distribution of all the properties and assets of A. Overholt & Co. and West Overton Distilling Company and the receipt by R. B. Mellon in such distribution of money and property amounting to in excess of $600,000, at the time the deficiency involved in this proceeding was determined and assessed by the Commissioner of Internal Revenue, and collected by the defendant, R. B. Mellon was

indebted to the United States as a transferee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount collected by the defendant from R. B. Mellon as hereinbefore set forth.

107. The Court erred in failing and refusing to find as a matter of fact as requested by the defendant that (Finding 43):

Defendant is not indebted to R. B. Mellon, or any or all of the plaintiffs, or either of them, in any sum whatsoever.

108. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 1):

Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

109. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 2):

As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

110. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 3):

As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

111. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 4):

Under the provisions of Section 218 of the Revenue Act of 1918, R. B. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

112. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 5):

The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

113. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 6):

There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

114. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 7):

> There is no warrant in law for the plaintiffs' contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until R. B. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

115. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 8):

> The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

116. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 9):

> Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

117. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 10):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

118. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 11):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

119. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 12):

Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in controversy in this action were assessed and collected, was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organizations for the year 1920.

120. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 13):

> Plaintiffs are estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against R. B. Mellon for the year 1920, was not lawfully assessed and legally collected.

121. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 14):

> If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy was determined, assessed and collected, R. B. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $187,787.17, collected by the defendant from R. B. Mellon as a deficiency in tax and interest thereon for the year 1920.

122. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 15):

> In equity and good conscience the plaintiffs ought not to recover of and from the defendant herein.

123. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 16):

The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant from R. B. Mellon.

124. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 17):

The pleadings, and the evidence in this case, with every inference that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

125. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 18):

Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiffs and against the defendant.

126. The Court erred in failing and refusing to find as a conclusion of law as requested by the defendant that (Conclusion 19):

The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiffs' statement of claim, at plaintiffs' costs.

127. The Court erred in disregarding all of the evidence and in adopting verbatim plaintiff's statement of claim as its findings of fact, to the extent

thereof, that is to say, the Court's Findings 2, 3, 4, 5, 6 and 7 are identical with Paragraphs 2, 3, 4, 5, 6 and 7, respectively, of plaintiff's statement of claim; and, in that Finding 8 is identical with Paragraph 9 of the statement of claim, except that Exhibits A and B are not made part of the findings; and, in that Findings 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are identical with Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22 and 25, respectively, of plaintiff's statement of claim; and, in that Finding 22 is substantially identical with Paragraph 26 of the statement of claim, and Finding 24 is identical with Paragraph 28 of the statement of claim.

128. The Court erred in failing to rule, prior to conclusion of the trial, on the admissibility of Defendant's Exhibits G, H, R, HH to LLL, and each of them because each and all of said Exhibits, when offered in evidence, were objected to by counsel for plaintiff and the rulings of the Court were either: "Admitted * * * and consideration given to it later"; "will admit it for the present"; "overruled for the present"; "admitted, subject to future ruling"; "admitted temporarily, subject to later ruling"; "objection overruled for the time being"; "objection overruled for the present", or "ruling will be in effect reserved"; that it does not appear by any rulings whether the Court admitted said Exhibits or any thereof in evidence and gave no credence to them in arriving at his findings, conclusions and judgment, or whether the Court excluded said Exhibits and each and every thereof from consideration as not being admissible.

WHEREFORE, defendant prays that the judgment heretofore rendered by the District Court herein be reversed, and that said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's statement of claim and action brought herein.

CHARLES F. UHL,
CHARLES F. UHL,
United States Attorney.

D. LLOYD CLAYCOMB,
D. LLOYD CLAYCOMB,
Assistant United States Attorney.

Bill of Exceptions.

(Filed June 30, 1936.)

IN THE DISTRICT COURT OF THE UNITED STATES.

FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

A. W. MELLON,
Plaintiff,
v.
D. B. HEINER, Individually and as former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania,
Defendant.

No. 6980 Law.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE and THE UNION TRUST COMPANY OF PITTSBURGH, Executors of the ESTATE OF R. B. MELLON, Deceased,
Plaintiffs,
v.
D. B. HEINER, Individually and as former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania,
Defendant.

No. 6979 Law.

BE IT REMEMBERED, that on the trial of the above causes, which were duly consolidated therefor, which

trial commenced on October 29, 1934, and ended on October 31, 1934, in this Court, at the May term, A. D. 1934, of said Court, the Honorable Robert M. Gibson, Judge, sitting without a jury, trial by jury having been expressly waived in each case by stipulation in the record, William A. Seifert, Esquire, John G. Frazer, Esquire, W. W. Booth, Esquire, and D. D. Shepard, Esquire, appearing as attorneys for plaintiffs, Horatio S. Dumbauld, Esquire, United States Attorney, D. Lloyd Claycomb, Esquire, Assistant United States Attorney, M. H. Eustace, Esquire, Special Assistant to the Attorney General, George H. Zeutzius, Esquire, Special Assistant to the Attorney General, and E. L. Updike, Esquire, Bureau of Internal Revenue, appearing as counsel for defendant, the following proceedings were had:

The plaintiffs in said consolidated causes, to sustain the issues upon their part, offered the following as their evidence in chief:

Mr. Booth:

If the Court please, plaintiff offers in evidence the following paragraphs of the statement of claim in No. 6980 Law, A. W. Mellon vs. Heiner, which have been admitted or not denied in the affidavit of defense:

Paragraph 1:

1. Plaintiff, A. W. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

Paragraph 2:

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the

first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

Paragraph 3:

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and has filed his income tax returns on the cash receipts and disbursements basis of accounting.

Paragraph 4:

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania his income tax return for the calendar year 1920, and upon the dates appointed by law duly paid to said Collector and to defendant the tax of $919,777.86 shown by said return to be due to the Government of the United States, as follows:

March 15, 1921	$229,944.46
June 15, 1921	229,944.46
September 15, 1921	220,293.77
September 15, 1921 (credit on account of overpayment of 1917 tax)	9,650.69
December 15, 1921	229,944.48
	$919,777.86

Paragraph 5:

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $190,419.70 was disclosed.

Paragraph 6:

6. Thereafter, and on or about March 23, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of $190,419.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $190,419.70 together with interest thereon of $12,082.52, and threatened to assess and collect additional interest, and make seizures if payment should not be made within the specified ten days' time.

Paragraph 7, as qualified by the affidavit of defense as to dates:

7. On or about April 2, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $190,419.70 and $12,082.52.

Paragraph 9:

9. On or about December 12, 1918, plaintiff, his brother R. B. Mellon and H. C. Frick entered into two separate written partnership agreements

to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached hereto, made a part hereof and marked Exhibits "A" and "B", respectively.

Mr. Booth:

I offer in evidence the said Exhibits "A" and "B" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Mr. Booth:

Paragraph 10, as admitted by the affidavit of defense:

> 10. Henry C. Frick died on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

Mr. Eustace:

If the Court please, defendant objects to the interpretation of the admission in Paragraph 10 of the statement of claim, in which the defendant uses the following language:

> In answer to the allegations contained in Paragraph 10 of the statement of claim, defendant ad-

mits that Henry C. Frick died on or about December 2, 1919. Defendant further admits that no new formal partnership agreements in writing were entered into between the plaintiff and Richard B. Mellon, or between said parties and the personal representatives of Henry C. Frick.

The remainder of the answer to Paragraph 10 is set up in the way of affirmative matter.

The Court:

Well, the facts as alleged in Paragraph 10, however, are not denied. You have simply attached to it a paragraph which denies the effect which the plaintiff later claims, but that is a mere matter of a legal proposition. This does not deny the allegations of Paragraph 10 at all.

Mr. Eustace:

We merely wanted to call attention to the qualification.

The Court:

Yes, I notice that. They later assume a dissolution, which is a mere matter of law, upon which of course you may be heard later, if you want to. But it is not a denial of the actual facts.

Mr. Booth:

The last sentence of Paragraph 11:

11. * * * By written agreement dated January 31, 1921, the liquidating trustees appointed the Union Trust Company of Pittsburgh liquidating agent, to carry out the liquidation of the assets and

businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D" respectively.

I offer in evidence Exhibits "C" and "D" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Mr. Eustace:

At this time, if the Court please, the offer is objected to, as irrelevant and immaterial, for the reason that it refers to actions of the parties after the year 1920. One of the defenses interposed, and which we hope to sustain, is that the tax for the year 1920 is the only tax involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in these cases.

The Court:

The objection is overruled for the present, and an exception noted.

Mr. Booth:

I offer in evidence Paragraph 13, as not being specifically denied:

13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

Mr. Eustace:

To that offer defendant objects, for the reason it is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer in evidence the averments of Paragraph 14 of the statement of claim, as not being specifically denied:

> 14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees or by the said liquidating agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

Mr. Eustace:

At this time defendant objects to the inclusion of that part of paragraph 14 of the statement of claim "during the period of liquidation," in the first line, and in the third line "liquidating trustees," for the reason that they tender conclusions of law and not statements of fact.

The Court:

That objection is overruled for the present. Of course it requires a later determination of the status

of those particular persons named, but it is overruled for the present, subject to an exception.

Mr. Eustace:

Exception, of course.

Mr. Booth:

I offer Paragraph 16, for the same reason:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

Mr. Eustace:

Same objection to those portions of Paragraph 16 of the statement of claim, in the latter part of the first line and the first part of the second line, the words "while acting in the capacity of liquidating trustees," and the last two words in the third line and first four words of the fourth line, "treating the same as trust properties," for the reason that they are conclusions of law.

The Court:

Objection overruled for the present, and exception noted.

Mr. Booth:

I now offer Paragraph 17:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by

holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

Mr. Eustace:

Objection is made to the entire Paragraph 17 in the statement of claim, for the reason that it is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I now offer Paragraph 18, with the omission of certain words denied by the affidavit:

18. In his return for said year 1920, plaintiff * * * included as taxable profit his undistributed share of the so-called * * * profits of A. Overholt & Company in the amount of $48,350.74, and his share of the so-called * * * profits of West Overton Distilling Company in the amount of $5,960.55 * * *.

Mr. Eustace:

As to the word "undistributed" in the last line on page 5 of the statement, that is objected to as irrelevant and immaterial.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 19:

19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28 respectively.

Paragraph 20:

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

Mr. Eustace:

Defendant objects to the admission of Paragraph 20 of the statement of claim as read, for the reason that it is wholly immaterial and irrelevant to any of the issues in this case.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 21:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.

Mr. Eustace:

That is objected to, for the reason that the affirmative matter set up by the defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of the statement of claim; and for the further reason that said allegations are wholly irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 22:

22. The Commissioner in examining the income tax return filed by the plaintiff for the year

1925 included in income for that year the difference between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

Mr. Eustace:

To which offer objection is made, for the reason that the last sentence read by counsel is specifically denied in the last sentence of Paragraph 22 of the amended affidavit of defense; and for the further reason that the matter alleged in Paragraph 22 of the statement of claim is irrelevant and immaterial.

The Court:

It doesn't seem to be a specific denial of that last sentence.

Mr. Booth:

If the Court please, it is a specific denial in that it uses the exact words of the statement of claim, but under the decisions of Pennsylvania under the Practice Act it does not constitute, in our opinion, as we submit, a specific denial. It may be they did not include all the profits, but they have to go one step further and say whether or not they included any profits. In other words, if I am sued for $1,000, and I in my affidavit set forth that I did not owe the plaintiff $1,000,

that has been held not to be good; I have to go one step further and say whether I owe him $800 or whether I owe him nothing. They have not denied that they have not included any of the profits.

The Court:

Well, the objection is overruled for the present, and exception noted.

(The Court later in the trial, upon motion of the defendant for leave to amend his affidavit of defense in answer to Paragraph 22 of the statement of claim, allowed an amendment in answer to the second or last sentence of Paragraph of said statement of claim, as will hereinafter appear.)

Mr. Booth:

I offer Paragraph 23:

23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of $48,906.45 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said part-

nerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

> Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.

Mr. Eustace:

To which offer the defendant objects, for the reason that Paragraph 23 of the statement of claim is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case, and as redundant.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer Paragraph 25, as far as admitted:

> 25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of $194,160.75 for the year 1920.

Paragraph 26:

> 26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon

either as to the allowance or the disallowance of said refund.

Mr. Booth:

I call the Court's attention to the fact that the statement of claim, as shown by the record, was filed October 24, 1933, and that on that date this statement was true, although it is not true now.

Paragraph 28:

28. The Commissioner of Internal Revenue has included * * * profits of $281,779.95 and $52,-814.28 of A. Overholt & Company and West Overton Distilling Company, respectively, in the income of the plaintiff for the year 1920, and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

Mr. Eustace:

Objection is made to that part of Paragraph 28 of the statement of claim reading "and has also included said profits in plaintiff's income for 1925," for the reason that it is irrelevant and immaterial; and also the last sentence of Paragraph 28, reading "He has assessed and collected a tax on the same income in each of said years," for the reason that that allegation is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

In the case of Estate of R. B. Mellon vs. Heiner, No. 6979 Law, I offer in evidence the following paragraphs of the statement of claim, which have been admitted or not denied in the affidavit of defense:

Paragraph 1:

1. Plaintiff, R. B. Mellon, resides in the City of Pittsburgh, Allegheny County, Pennsylvania, and in the Western District thereof.

Paragraph 2:

2. Defendant, D. B. Heiner, since on or about the first day of August, 1921, to on or about the first day of July, 1933, and at the time this suit was instituted, was the duly appointed, qualified and acting Collector of Internal Revenue in and for the Twenty-third District of Pennsylvania, and is a resident of the Borough of Kittanning, in the Western District thereof.

Paragraph 3:

3. Plaintiff, during the year 1920 and at all times before and since, has kept his books and records and has filed his income tax returns on the cash receipts and disbursements basis of accounting.

Paragraph 4, as qualified by dates:

4. On or before the date appointed by law, to-wit, March 15, 1921, plaintiff filed with the then Collector of Internal Revenue for the Twenty-third District of Pennsylvania his income tax re-

turn for the calendar year 1920, and upon the dates appointed by law duly paid to said Collector and to defendant the tax of $406,673.28, shown by said return to be due to the Government of the United States as follows:

March 15, 1921	$101,668.32
June 17, 1921	101,668.32
September 19, 1921	101,668.32
December 17, 1921	101,668.32
Total	$406,673.28.

Paragraph 5:

5. By letter dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called "Commissioner") notified plaintiff that his tax return for the year 1920 had been examined in connection with a report of a federal revenue agent and that as a result of such examination a deficiency in tax of $175,259.70 was disclosed.

Paragraph 6:

6. Thereafter, and on or about May 10, 1927, defendant notified plaintiff that the Commissioner had assessed the deficiency in tax of $175,259.70 for the year 1920 as set forth in said Commissioner's letter and served on plaintiff notice and demand for the payment within ten days of said sum of $175,259.70, together with interest thereon of $12,527.47, and threatened to assess and collect additional interest, and make seizures if payment

should not be made within the specified ten days' time.

Paragraph 7:

7. On or about May 19, 1927, under written protest and for the purpose of avoiding additional interest, penalties and seizures, plaintiff paid to defendant said sums of $175,259.70 and $12,527.47.

Paragraph 9:

9. On or about December 12, 1918, plaintiff, his brother A. W. Mellon and H. C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of "A. Overholt & Company" and "West Overton Distilling Company", each being registered under the Fictitious Names Act. True and correct copies of said partnership agreements are attached hereto, made part hereof and marked Exhibits "A" and "B," respectively.

I offer in evidence the Exhibits "A" and "B" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Paragraph 10, as admitted by the affidavit of defense:

10. Henry C. Frick died on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving

partners and the personal representatives of the deceased partner, relative to the businesses of the former partnerships.

Mr. Eustace:

If the Court please, defendant calls attention to the qualification of the admission of Paragraph 10 of the statement of claim as set forth in Paragraph 10 of the affidavit of defense, similiar to the qualification of Paragraph 10 in the case of A. W. Mellon vs. Heiner, at No. 6980 Law.

Mr. Booth:

The last sentence of Paragraph 11:

11. * * * By written agreement dated January 31, 1921, the liquidating trustees appointed The Union Trust Company of Pittsburgh liquidating agent, to carry out the liquidation of the assets and businesses of the said two former partnerships, true and correct copies of which are attached hereto, made part hereof and marked Exhibits "C" and "D" respectively.

I now offer in evidence Exhibits "C" and "D" attached to the statement of claim. (Said exhibits are printed elsewhere in the record as exhibits to the statement of claim.)

Mr. Eustace:

The offer is objected to, if the Court please, as irrelevant and immaterial, for the reason that it refers to actions of the parties after the year 1920. One of the defenses interposed, and which we hope to sustain,

is that the tax for the year 1920 is the only tax involved and that the actions of the parties with reference to any other time, or the tax for any other year, is wholly immaterial to a determination of the issues in these cases.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I offer in evidence Paragraph 13, as not being specifically denied:

> 13. Liquidation was finally consummated and distribution made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

Mr. Eustace:

Defendant objects to that offer, for the reason it is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

I offer in evidence the averments of Paragraph 14 of the statement of claim, as not being specifically denied:

> 14. During the period of liquidation, from December 2, 1919 to and including the year 1925, no distilling operations had been carried on by the said liquidating trustees or by the said liquidating

agent, and all sales of assets of the former partnerships by either the said liquidating trustees or by the said liquidating agent were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors.

Mr. Eustace:

At this time defendant objects to the inclusion of that part of Paragraph 14 of the statement of claim "during the period of liquidation" in the first line, and in the third line "liquidating trustees", for the reason that they tender conclusions of law and not statements of fact.

The Court:

That objection is overruled for the present. Of course, it requires a later determination of the status of those particular persons named, but it is overruled for the present, subject to an exception.

Mr. Eustace:

Exception, of course.

Mr. Booth:

I offer Paragraph 16, for the same reason:

16. Plaintiff and his brother, while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash.

Mr. Eustace:

Same objection to those portions of Paragraph 16 of the statement of claim, in the latter part of the first line and the first part of the second line, the words "while acting in the capacity of liquidating trustees", and the last two words in the third line and first four words of the fourth line, "treating the same as trust properties", for the reason that they are conclusions of law.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

I now offer Paragraph 17:

17. The Commissioner determined and settled the federal tax liability of the estate of the deceased partner for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

Mr. Eustace:

Objection is made to the entire paragraph 17 in the statement of claim, for the reason that it is wholly irrelevant and immaterial to any issue involved in this case, and redundant for the purpose.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 18, with the omission of certain words denied by the affidavit:

> 18. In his return for said year 1920, plaintiff * * * included as taxable profit his undistributed shares of the so-called * * * profits of A. Overholt & Company in the amount of $48,350.74, and his share of the so-called * * * profits of West Overton Distilling Company in the amount of $5,960.55 * * *.

Mr. Eustace:

As to the word "undistributed" in the second line of Paragraph 18 of the statement of claim, that is objected to, as irrelevant and immaterial.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 19:

> 19. The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,350.74 and $5,960.55 as reported on the return to $281,779.95 and $52,814.28 respectively.

Paragraph 20:

20. Plaintiff duly filed tax returns for the years 1921 to 1925, both inclusive, and for said years erroneously reported his share of the so-called profits or losses of the liquidating agent of the partnerships A. Overholt & Company and West Overton Distilling Company and paid the tax on the profits so reported, although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925.

Mr. Eustace:

Defendant objects to the admission of Paragraph 20 of the statement of claim, as read, for the reason that it is wholly immaterial and irrelevant to any of the issues in this case.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 21:

21. The Commissioner in examining the return for the year 1924 eliminated the profit and the loss so reported for that year with the following explanations as set forth in his letter to plaintiff dated November 14, 1928:

Loss on the liquidation of West Overton Distilling Company has been eliminated as it is held that the liquidation was consummated in 1925.

Profit on the liquidation of A. Overholt & Company has been eliminated as it is held that the corporation (error partnership) was liquidated in 1925.

Mr. Eustace:

That is objected to, for the reason that the affirmative matter set up by the defendant in his amended affidavit of defense constitutes a denial of the allegations of Paragraph 21 of the statement of claim; and for the further reason that said allegations are wholly irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 22:

22. The Commissioner in examining the income tax return filed by the plaintiff for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation, including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years.

Mr. Eustace:

To which offer objection is made, for the reason that the last sentence read by counsel is specifically

denied in the last sentence of Paragraph 22 of the amended affidavit of defense; and for the further reason that the matter alleged in Paragraph 22 of the statement of claim is irrelevant and immaterial.

The Court:

It doesn't seem to be a specific denial of that last sentence.

Mr. Booth:

If the Court please, it is a specific denial in that it uses the exact words of the statement of claim, but under the decisions of Pennsylvania under the Practice Act it does not constitute, in our opinion, as we submit, a specific denial. It may be they did not include all the profits, but they have to go one step further and say whether or not they included any profits. In other words, if I am sued for $1,000, and I in my affidavit set forth that I did not owe the plaintiff $1,000, that has been held not to be good; I have to go one step further and say whether I owe him $800 or whether I owe him nothing. They have not denied that they have not included any of the profits.

The Court:

The objection is overruled for the present, and exception noted.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 144

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

PAUL MELLON, DAVID K. E. BRUCE, AND DONALD D. SHEPARD, EXECUTORS OF THE ESTATE OF A. W. MELLON, DECEASED

No. 145

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1937

CERTIORARI GRANTED OCTOBER 11, 1937

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(The Court later in the trial, upon motion of the defendant for leave to amend his affidavit of defense in answer to Paragraph 22 of the statement of claim, allowed an amendment in answer to the second or last sentence of Paragraph 22 of said statement of claim, as will hereinafter appear.)

Mr. Booth:

Paragraph 23, except that the amount of the deficiency in this case asserted by the Commissioner was $41,008.84:

> 23. In his final deficiency letter to the plaintiff, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiff that a deficiency of $41,008.84 would be assessed unless an appeal were taken to the United States Board of Tax Appeals within sixty days. Plaintiff took no appeal, and the deficiency was assessed and payment duly made. This deficiency arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiff on his tax return from the liquidation of said partnerships and included as capital gain the entire net profit on the liquidation, together with the aforementioned profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation:

Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.

Mr. Eustace:

To which offer the defendant objects, for the reason that Paragraph 23 of the statement of claim is wholly immaterial and irrelevant, does not present any issue material to the determination of the issues in this case, and as redundant.

The Court:

The objection is overruled for the present, and exception noted.

Mr. Booth:

Paragraph 25, as far as admitted, in that the claim for refund was for $187,787.17:

25. On or about March 19, 1929, plaintiff filed with the defendant, on the form prescribed by the Commissioner for that purpose, claim for refund of $187,787.17 for the year 1920.

Paragraph 26:

26. Although more than six months' time has expired since the filing of this claim for refund the Commissioner has taken no action thereon either as to the allowance or the disallowance of said refund.

I call the Court's attention to the fact that the statement of claim, as shown by the record, was filed October 24, 1933, and that on that date this statement was true, although it is not true now.

Paragraph 28:

28. The Commissioner of Internal Revenue has included * * * profits of $281,779.95 and $52,-814.28 of A. Overholt & Company and West Overton Distilling Company, respec vely, in the income of the plaintiff for the year 19), and has also included said * * * profits in plaintiff's income for 1925. He has assessed and collected a tax on the same income in each of said years.

Mr. Eustace:

Objection is made to that part of Paragraph 28 of the statement of claim reading "and has also included said profits in plaintiff's income for 1925", for the reason that it is irrelevant and immaterial; and also the last sentence of Paragraph 28, reading "He has assessed and collected a tax on the same income in each of said years," for the reason that that allegation is irrelevant and immaterial.

The Court:

That objection is overruled for the present, and exception noted.

Mr. Booth:

If the Court please, I offer in evidence as Plaintiffs' Exhibit No. 1, claim for refund filed by R. B. Mellon on or about March 19, 1929 of income tax for the year 1920.

Mr. Booth:

I offer in evidence claim for refund for the year 1920 filed by A. W. Mellon on or about March 19, 1929, duly certified in accordance with law. The claim for refund has two letters attached to it, which are not

properly part of the claim for refund, and the offer in evidence does not include those two letters, but for the purpose of convenience and at the request of the defendant, we are leaving them attached to the claim for refund; they are to be excluded from our exhibit, however. The claim for refund is offered as Plaintiff's Exhibit No. 2.

Mr. Eustace:

No objection.

Mr. Booth:

If the Court please, I offer in evidence as Plaintiffs' Exhibit No. 3 income tax return filed on behalf of A. Overholt & Company for the year 1920.

I also offer in evidence, as Plaintiffs' Exhibit No. 4, return of income filed by West Overton Distilling Company for the year 1920.

Plaintiffs' said Exhibits 1, 2, 3 and 4 so offered and admitted in evidence are in words and figures as follows, to-wit:

Plaintiffs' Exhibit No. 1.
(Page 349.)

Plaintiffs' Exhibit No. 2.
(Page 350.)

Plaintiffs' Exhibit No. 3.
(Page 351.)

Plaintiffs' Exhibit No. 4.
(Page 352.)

BLANK

PAGE

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

CLAIM FOR

- [ ] ABATEMENT OF TAX ASSESSED
- [ ] CREDIT AGAINST OUTSTANDING ASSESSMENTS
- [X] REFUND OF TAXES ILLEGALLY COLLECTED
- [ ] REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION

District

Account number

Date received

RECEIVED
Collector of Internal Revenue
23rd District of Pennsylvania
MAR 19 29
PITTSBURGH OFFICE

Collector of Internal Revenue

State of Pennsylvania
County of Allegheny } ss. 1929

NOTICE TO COLLECTOR

(Collector must indicate in block above the kind of claim, except in Income Tax cases.

RECEIVED
Date received by Assistant Com'r
MAR 25 1929
CLAIMS SECTION CONTROL

H. C. MELLON

(Name of taxpayer or purchaser of stamps.)

6500 Fifth Avenue,

(Residence—give street and number as well as city or town and State)

Pittsburgh, Pa.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

PERIOD	YEAR
From Jan. 1	
To Dec. 31	

1. Business engaged in: Banker
2. Character of assessment or tax: Income
   (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased: $
4. Computation of Tax Liability requested (Income and Profits Tax): $
5. Amount to be abated: $
6. Amount to be refunded (or such greater amount as is legally refundable): $ 187,78[illegible]
7. Date and number of taxpayer's receipts or indorsements of canceled checks: 5/29/27 M/Y 27 1929

RECEIVED
MAY 27 1929
Office of Internal Revenue
Collector
PITTSBURGH, PENNSYLVANIA

8. Whether income tax liability, items 8-11, inclusive, must be answered: 23rd Penn'a.
9. Income tax return (if any) was filed:
10. Period covered by original assessment or return:
11. Taxable period on which credit is asked: period from to
12. Reasons why this application should be allowed for the following reasons:

For 1920 there was included in my income the [illegible] as operating profits of the partnerships [illegible] and West Overton Distilling Co., respectively. [illegible] Revenue increased the income reported from [illegible] and $52,814.28, respectively, and assessed additional taxes thereon. Mr. H. C. Frick, one the partners, [illegible] remaining assets of these partnerships were [illegible]. The Commissioner of Internal Revenue has determined [illegible] were in liquidation from the death of Mr. Frick [illegible] remaining partners and the Estate are taxable [illegible] final liquidation was made and that no profit or loss for any year from 1919

(continued on attached sheet)

(Attach supplemental sheets if necessary.)

Subscribed and sworn to before me this 21st day of March, 1929

Signed: H C Mellon

Thos. W. Anderson
Notary Public.
(Title.)

N. V. ANDERSON, Notary Public
MY COMMISSION EXPIRES [illegible]

(Affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

20880M

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
R. B. Wilson		23	1921	30	190		$ 101668.32	3-15-21	23rd D.
650 Main St. Ave.	Income						101668.32	6-17-21	" "
Catasauqua, Pa.	1920						101668.32	9-19-21	" "
							101668.32	12-17-21	" "
		23	1927	May	010	Tax	175259.20		
						Int.	12528.47		
							187787.67	6-19-27	" "

Collector of Internal Revenue

Assessment Clerk, Commissioner's Office

I certify that the records of my office show the following facts as to the purchase of stamps:

Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	If special tax stamp, state: Period commencing.
				$		

REJECTED
2413
I. T. SCHEDULE

Collector _____ District _____

Schedule Number _____

Allowed or Rejected Number _____

(Signature of Insp.)

Claimant _____

Address _____

Examined and submitted for action _____, 19____

COMMITTEE ON CLAIMS

Claim received 11/33

Claim approved for $ _____

Chief of Division.

Amount claimed $ 187787.67

Amount allowed $ _____

Amount rejected $ 187787.67

to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for those years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM —Jan., 1922
Comptroller General U. S.
January 18, 1922

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
District
Account number
Date received

IMPORTANT
File with Collector of Internal Revenue whose assessment was made. Not acceptable unless completely filled in.

1921

State of Pennsylvania } ss:
County of Allegheny

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

RECEIVED
Date received by Administrative Unit
MAR 25 1929
Stamp here
CLAIMS CONTROL SECTION

RECEIVED
Collector of Internal Revenue
23rd District of Pennsylvania
MAR 19 1929
Signature
PITTSBURGH OFFICE
Collector of Internal Revenue

TYPE OR PRINT

A. W. MELLON
(Name of taxpayer or purchaser of stamps.)
Pittsburgh, Pennsylvania.
(Residence—give street and number, or other description sufficient for mailing or town and State.)
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on be[redacted] that the facts given below with reference to said statement are true and complete:

1. Business in which engaged Secretary of the Treasury
2. Character of assessment or tax Income
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $
4. Reduction of Tax Liability requested (Income and Profits Tax) $
5. Amount to be abated $
6. Amount to be refunded (or such greater amount as is legally refundable) $124,160.75
7. Date of payment (see Collector's receipts or indorsements of canceled checks) 3/1/27
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed 23rd Penn'a.
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit
11. Unpaid assessment against which credit is asked; period from to

RECEIVED MAY 27 1927 Office of Head Dept. Review Division

Deponent verily believes that this application should be allowed for the following reasons:

In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $281,779.95 and $52,814.28, respectively, and asse[redacted] lected additional taxes thereon. Mr. H. C. Frick, one of the [redacted] in 1919. In 1925 the remaining assets of these partnerships [redacted] distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year

(continued on attached sheet)

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 19th day of March, 1929

M. E. Conner
Notary Public.
(Title.)

M. E. CONNER, Notary Public
MY COMMISSION EXPIRES MARCH 11, 1929

Signed:
A. W. Mellon
by Hill Johnson
Agent

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

45—11764

2092701

Schedule No. ____

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							Tax 9,977.86		
C. H. Mellon		52	1921	March			$2299.44 46	6-15-21	23rd "
Pittsburgh Pa.							2299.44 46	6-15-21	
	Income						2299.44 46	9-15-21	
	1921						2299.44 46	12-15-21	
							1650.69	Ex. Def. 33 "	
		52	1921	March	20	2	907.17 70		
							Tax 12082.62		
							20502.22-4-2-27		

Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

Claim No. ____

I certify that the records of my office show the following facts as to the purchase of stamps:

Name of taxpayer as given.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	If special tax stamp, state: Period commencing—
					$		

Collector _____ District _____

REJECTED
21413
T. SCHNEIDLE

Schedule Number _____

District _____

Rejected Number _____

(Nature of tax.)

Claimant _____

Examined and submitted for action _____, 19____

COMMITTEE ON CLAIMS

Amount allowed $194160 75

Amount rejected $194160 75

from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for those years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

HWJ

...R A PERIOD
...ER THAN A
...AR YEAR, THE
...I SHOULD BE
...N OR BEFORE
...TH DAY OF
...IRD MONTH
...OWING THE
...E OF SUCH
...ERIOD

...UM 15 PER
...AR YEAR 19...
...WITH THE
...LECTOR OF
...AL REVENUE
...UR DISTRICT
...R BEFORE
...CH 15, 1921

[redacted]

FOR CALENDAR YEAR 1920

Or for period begun JAN. 1, 1920, and ended DEC. 31 1920, 19...

If the return is made for a period other than a calendar year, the date of the beginning and ending of the period covered must be plainly stated in the space provided above.

PRINT PLAINLY PARTNERSHIP'S OR CORPORATION'S NAME AND BUSINESS ADDRESS

A Overholt & Co
1010 Frick Bldg
Pittsburgh Pa

Executors
3-21-23

...YEAR BE...

...PENNSYLVANIA

...Dist. PENNA.

...F BUSINESS ..... STATE WHETHER PARTNERSHIP OR CORPORATION .....

SCHEDULE A—INCOME TO BE ACCOUNTED FOR BY MEMBERS.

| | | |

nt of interest ... $

TOTAL INTEREST ON ALL OBLIGATIONS AS SHOWN ABOVE (to be entered as Item 4, Schedule A, and distributed in column 5, Schedule C) $

the amount of Victory Liberty Loan 3½ and 4½ Notes originally subscribed for and still owned at the date of filing this return $

the amount of Fourth Liberty Loan 4¼ Bonds originally subscribed for and still owned at the date of filing this return $

SCHEDULE C—MEMBERS' SHARES OF INCOME, ETC.

nter below the share of net income (whether distributed or not) of each member of the partnership or shareholder of the personal service corporation and each member's share of
come and profits taxes paid by the partnership or corporation to a foreign country or to a possession of the United States. (See page 1 of instructions) (Report on lines 38 to 14, inclusive, of
the distributable income in the case estates are determined on a basis other than a calendar year, attach an explanatory statement.

Memoranda of partnership or corporation agreements affecting the basis of distribution

1. Name and address of each, as shown on Individual Income Tax return.	2. Interest on obligations of U. S. and its possessions.	3. Dividends on Par. 1, Schedule A.	4. Dividends.	5. Interest on obligations of U. S. and War Savings Certificates. Par. 2, Schedule A.	6. Other income.	7. Amount of line 6 subject to normal tax.
Richard B.Mellon, Pittsburgh, Pa.	1/3					
Andrew W.Mellon Pittsburgh, Pa.	1/3					
Estate of H.C.Frick, Pittsburgh, Pa.	1/3					
TOTALS ...						

I, undersigned, being severally duly sworn, each for himself ... and to the best of his knowledge and belief a true and complete ... and statements, has been examined by him ... under authority thereof. ... and the Regulations ...

Sworn to and subscribed before me this ... day of ...

(Signature of officer administering oath)

(Title of officer administering oath)

My Commission Expires February 21, 1922

1/18/22

SCHEDULE D—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS.

m Schedule A, Item 28	$	145	052	25
be accounted for by members:				
n obligations of the United States issued before Septem- 1917, Victory Liberty Loan 4½% Notes and obligations d States' possessions				
n obligations of States, Territories, and political sub- ns thereof				
n Farm Loan Bonds issued under Federal Farm Loan				
s on stock of personal service corporations from not earned during the period between January 1, 1918, and inning of present accounting period				
which are derived from the sale of vessels, and which are under Section 28 of the Merchant Marine Act of 1920				
ems (to be detailed):				
reserves for bad debts, contingencies, etc. (to be detailed):				
1 to 3, inclusive	$	145	052	25
m 13				
period as shown by books, before any adjustments are (Item 4 minus Item 5)	$	145	052	25
ndivided profits as shown by balance sheet at close of xable period				
o surplus (to be detailed):				
6 to 8, inclusive	$			
ndivided profits as shown by balance sheet at close of period (Item 9 minus Item 10)	$	145	052	25

11. Deductions not charged against income:		
(a) Repayments and recoveries		
(b) Interest on investments issued or guaranteed by the United States or its possessions (other than obligations of the United States issued after September 24, 1917), the interest upon which is wholly exempt from taxation		
(c) Additions to sinking fund reserves, and reserves for bad debts and other contingencies (to be detailed):		
(1)		
(2)		
(3)		
(d) Other unallowable deductions (to be detailed):		
(1)		
(2)		
(3)		
12. Total of Item 12	$	
14. Dividends or withdrawals (state whether paid in cash, stock of this company, or other property):		
(a) Date paid ..... Character	$	
(b) Date paid ..... Character		
(c) Date paid ..... Character		
(d) Date paid ..... Character		
15. Other debits to surplus (to be detailed):		
(a)		
(b)		
15. Total of Items 14 and 15	$	

SCHEDULE E—BALANCE SHEETS.

to balance sheets as of the beginning and end of the taxable year (preferably in parallel columns), showing as nearly as practicable the details called for below: (These should be prepared from the books and should be in agreement therewith, or any differences should be reconciled.)

ASSETS.

h in bank and on hand, certificates of deposit, etc.).
ore deducting reserves for losses).
m customers.
l notes receivable (to be classified).
es.
cts.
s and obligations (each issue to be stated separately). municipal, State, etc.).
ations—
d employees.
future operations (to be detailed.)

ASSETS (Continued).

Fixed assets:
Land.
Buildings.
Machinery.
Tools and minor equipment.
Delivery equipment.
Office furniture.
Other (state character).
TOTAL.
Less reserves for depreciation and depletion (show separately amount applicable to each fixed asset).*
NET VALUE.
Patents, good will, and other intangible assets:
Paid for in cash or other tangible property.
Paid for in stock (other than stock dividends) or in shares of a corporation.
Obtained by stock dividend or otherwise.
Discount:
On bonds.
On stock.
TOTAL.

*Reserves for depreciation may be deducted from the respective asset accounts or itemized on the liability side of the balance sheet.

LIABILITIES.

Loans and notes payable:
To members.
To others (including bank loans).
Accounts payable:
Trade.
Other.
Accrued expenses and reserves, the charges creating which are allowable deductions from income (to be detailed).
Reserves, the charges creating which are not allowable deductions from income (to be detailed):
Reserves for losses on notes and accounts receivable.
Other reserves (to be detailed).
Capital stock outstanding (to be classified) or all partners' capital and current accounts (to be detailed).
Surplus and undivided profits.
TOTAL.

QUESTIONS.

KIND OF BUSINESS.

...ase by letters given below, identify the corporation's main income producing activity with ...ness, and follow this by a special description of the business, sufficient to give the information ...h general class:
... and related industries, including fishing, logging, ice harvesting, etc., including the leasing ... State the product or products. B—Mining and quarrying, including gas and oil wells ... of such property. State the product or products. C—Manufacturing. State the product ...al if not implied by the name of the product. D—Construction—contractors, buildings, ...ships, etc., also equipping and installing same with systems, devices, or machinery, without ... State nature of structures built, materials used or kind of installations. E1—Transporta- ...local, etc. State the kind and special product transported, if any. E2—Public utilities—gas ...ter); electric light or power (hydro or steam generated); heating (steam or hot water); ... or power. E3—Storage—without trading or profit from sales (elevator, warehouses, stock- ... product stored. E4—Leasing transportation or utilities. State kind of property. F—...ught and not produced by the trading concern. State manner of trade, whether wholesale, ...n, and the product handled. Sales with storage with profit primarily from sales. G—Service— ... hotels, restaurants, etc.; amusements; other professional, personal, or technical service. H—Finance, including banking, real estate, insurance. I—Concerns not falling in above ... of combining several of them with no predominant business, or (b) for other reasons. ...ose business involves activity falling in two or more of the above general classes, where the ...erned, should report business as identified with but one of the above general classes, for ...n A or B which also transport and market their own product exclusively or mainly, should ...with classes A or B; concerns in C (manufacturing) ...

13. If the answer to questions 10, 11, and 12, or any of them, is "yes," the following information should be furnished as at the beginning of the accounting period, indicating any substantial changes during such period:

NAME OF SHAREHOLDER.	(Name of corporation) (Address) Shares held:	Percentage of stockholdings.	(Name of corporation) (Address) Shares held:	Percentage of stockholdings.
Total				

...state product stored. E4—Leasing transportation or utilities. State kind of property. F—...ds bought and not produced by the trading concern. State manner of trade, whether wholesale, ...sale, and the product handled. Sales with storage with profit primarily from sales. G—Service...ding hotels, restaurants, etc.; amusements; other professional, personal, or technical service...es. H—Finance, including banking, real estate, insurance. I—Transportation or utilities ...ause of combining several of them with no predominant business, or (5) for other reasons.

...s whose business involves activity falling in two or more of the above general classes, where the ...) concerned, should report business as identified with that one of the above general classes, for ...erns in A or B which also transport and market their own product exclusively or mainly, should ...d with classes A or B; concerns in C (manufacturing) which own or control the source of their ... B and which also transport, sell, or install their own product exclusively or mainly, should be ...manufacturing; concerns in D may control or own sources of supply of materials used exclusively ...eir constructive work; concerns in E1 or E2 may own or control the source of their material or ...s in F may transport or store their own merchandise, but its production would identify them ...

...:
...l class (use key letter designation) F.
...come producing business. Give specifically the information called for under each key letter, ...other acting as principal or as agent, on commission. State if inactive or in liquidation.

...ge of Whiskey - Bottling for Customers

... of Purchased Whiskey from corporation of ... name - Partnership in Liquidation.

...al service corporation must explain its business in sufficient detail to justify its claim to be...character of the business is different from that carried on during the preceding accounting period, ...e change must be explained. Where necessary, the statement should be made on a separate ...ould be firmly attached to this return.

OTHER CONCERNS IN SAME BUSINESS.

...rnish a list of the names and addresses of five representative concerns in your locality or section ...engaged in the same kind of business.

ORGANIZATION OR INCORPORATION.

...organization or incorporation December 20, 1918.

...orated, under the laws of what State?

...rporation a successor to or was it formed to take over or conduct part of the business of another ...

... If so, state name and address of predecessor or other organization, and in the latter ...ial, managerial, and contractual relationships existing between yourselves and the other organ...

VALUATIONS OF CAPITAL STOCK.

...as the fair value of the total capital stock of the corporation as determined in the last accompanied ...apital stock tax?

...mment.

AFFILIATIONS WITH CORPORATIONS.

...the corporation own directly or control through directly affiliated interests or by a nominee or ...r 50 per cent of the outstanding voting capital stock of another corporation? No.

...r 50 per cent of your voting capital stock owned by another corporation or by two or more corpora...affiliated?

...r 50 per cent of your voting capital stock as well as over 50 per cent of the voting capital stock of ...oration or of other corporations owned or controlled by the same individual or partnership or by ...ividuals or partnerships?

	Shares held.	stockholdings.	Shares held.	stockholdings.
Total				
Shares outstanding beginning of year				
Shares outstanding end of year				

(a) Separate statements should be submitted for common and preferred stock, indicating (1) whether it had full voting privileges during the entire accounting period; (2) whether the voting privileges were cumulative; (3) whether those voting privileges were exercised during the accounting period; (4) the conditions by which those voting privileges may be exercised or conferred.

(b) State the dividend privileges of the respective classes of stock; the rate of dividends paid during the accounting period; the date and rate of last dividend payment; and whether, and under what conditions, the preferred stock participates in the earnings above the fixed dividend rate.

(c) State if the preferred stock has preference in respect to distribution of assets, dividends or otherwise.

(d) Show separately the number of shares of each class held by the respective stockholders of each company, except where impracticable by reason of the large number of stockholders. Under such conditions show only those holding stock in two or more of the affiliated corporations.

(e) Indicate whether any of the stock was held during the accounting period conditionally or by agreement, expressed or implied, and state whether such arrangements are considered valid, giving supporting reasons.

(f) Indicate whether any stock is held by employees or officers and state their relationship to the corporation and the conditions, either expressed or implied, under which such stock was received and was held during the accounting period. Also submit the following information in respect to such stockholdings as at the date of acquisition: (1) Par values of stock; (2) book values of stock; (3) market values of stock; (4) consideration or amount paid for such stock; (5) method of payment for such stock.

(g) If the stock in any one or more of the corporations is held by members of one family, or related families, state the relations existing between the various stockholders and whether such stock was acquired by gift, purchase or otherwise.

(h) Explain fully the subsequent extent of any intercompany transactions or disagreement which may affect an ultimate distribution of profits or assets to any one of the affiliated corporations a disproportionate share of net income or invested capital.

Foreign corporations may not be included in consolidation.

GOVERNMENT CONTRACTS. None

14. Have any adjustments during the accounting period been made on account of contract or contracts with the Government or its agencies or from any other source, whether a contract or agreement which you derived personally directly or indirectly, through the operations of a claim board or otherwise? (Answer "Yes" or "No.") ...
If so, state the amounts involved, $...; whether or not such amounts are included in this return...; and, if not, was an amended return covering for the additional income filed for accounting period in which the contract was terminated? ... Submit a schedule showing full particulars of the contract, date entered into, date the work ended under said contract or contracts, and the amount and nature of the adjustment.

AMORTIZATION.

15. Has amortization been claimed? (Answer "Yes" or "No.") ... If so, for what year ... Amount, $...

PREPARATION OF RETURN.

16. Was anyone employed regularly to prepare or advise in the preparation of this return? (Answer "Yes" or "No.") No. If so, give name and address and state in what city, year, and on what advice was received.

LIST OF ATTACHED SCHEDULES.

17. Attach a list of schedules accompanying this return, giving for each a brief title and a schedule number. (See opening paragraph on page 2 of instructions.)

AMENDED RETURNS.

An amended return must be plainly marked "Amended" across the face of return.

42

IF RETURN IS FOR CALENDAR YEAR 1920 FILE IT WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1921

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR, THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

JUL 21 19

KIND OF BUSINESS

1. Gross sales, less returns and a
2. Less cost of goods sold, exclu
below (from Schedule A2)
3. Gross income from services or
4. Interest on obligations of the
War Finance Corporation E
5. Taxable interest from all othe
6. Rentals
7. Royalties
8. Share of net income earned by
or not)
9. Dividends from earnings of c
personal service corporation
10. Dividends on stock of foreign
11. Gross income from all other s
12. TOTAL OF ITEMS 1 TO 1
13. Ordinary and necessary expe
A13)
14. Compensation of members (in
commissions, and other com
15. Repairs (including labor, sup
16. Interest (from Schedule A16)
17. Taxes (except Federal incom
assessed against local bene
18. Debts ascertained to be wort
19. Exhaustion, wear and tear (
20. [redacted]
21. TOTAL OF ITEMS 12 TO
22. DIFFERENCE BETWEEN
23. Profit or loss on sales of capita
24. Losses sustained during accou
25. Amortization of War Facilitie
26. NET INCOME FOR ACCOUNTIN
22 AND ITEM 25)

OBLIGATIONS	First Liber Loan Conver 4% Bonds o 1932-47.
INTEREST DATES	June 15. December 1
Amount of interest	$

TOTAL INTEREST ON ALL O

TOTAL INTEREST ON ALL OBLIGATIONS AS SHOWN

State the amount of Victory Liberty Loan 3½% and 4¼%

State the amount of Fourth Liberty Loan 4¼% Bonds owi

SCH

Enter below the share of net income (whether distrib
any income and profits taxes paid by the partnership or co
If the distributable interests in the net income are

Name(s) of partner(s) to whom distributed (if personal inc

1. Name and address of each, as shown on individual tax retu

(a) Richard B. Mellon, Pittsburgh

(b) Andrew W. Mellon, Pittsburgh

(c) Estate of H.C.Frick, Pittsburgh

(d)

(e)

(f)

(g)

(h)

(i) TOTALS

The undersigned, being severally duly sworn, each for
and is to the best of his knowledge and belief a true and
issued under authority thereof.

Sworn to and subscribed before me this

Seal of officer making affidavit.

My Commission Expir
February 21, 1923

7/187 2

Plaintiff's Ex #3 10/29/34 H.T.

LIST OF SCHEDULES ATTACHED:

Schedule "E" - Balance Sheets.

Schedule A-3 - Gross Income other than Manufacturing.

Schedule A-5 - Taxable Interest.

Schedule A-13 - Ordinary & Necessary Expenses.

Schedule A-14 - Compensation of Member.

Schedule A-23 - Sale of Investment or Assets.

List of Other Concerns in same business.

SPECIAL SCHEDULE ON ACCOUNT LIQUIDATION.

REC'D - 1415
MAR 15 1921
Int'l Dist. PENNA

a 3

Printed 10/22/34

LIST OF OTHER CONCERNS IN SAME BUSINESS.

The Old '76 Distilling Co.,	Cincinnati, Ohio.
The Frankfort Distillery, Inc.	Frankfort, Ky.
E.H. Taylor, Jr. & Sons,	Frankfort, Ky.
Jas. B. Pepper Distilling Co.,	Lexington, Ky.
Sunnybrook Distilling Co.,	Louisville, Ky.
Rock Springs Distilling Co.,	Owensboro, Ky.

a4

A. OVERHOLT & COMPANY.
PITTSBURGH, PA.

SPECIAL SCHEDULE - AMOUNTS OF SALES, COSTS AND EXPENSES, ETC. APPLIED TO ACCOUNT OF LIQUIDATION FOR YEAR 1920 - UNION TRUST CO. OF PGH., LIQUIDATING AGENT.

LIQUIDATION:			
Sales of Bonded Whiskey from Bonded Warehouses			- $ 928,273.71
Inventory 1/1/20	- $595,676.55		
Do. 12/31/20	- 498,748.49		- 96,928.04
GROSS LIQUIDATION			- $ 831,345.67
COSTS CHARGED:			
Insurance,	$ 16,000.00		
Taxes,	3,000.00		
Salesmen's Sal.& Comm.	11,726.00		
Storage,	23,446.60		
U.S. Tax Paid,	9,857.70		
		64,030.30	
GENERAL EXPENSES:			
Distillery Labor, Expense and Maintenance,	46,791.27		
Salaries,	14,302.05		
Broad Ford Office Exp.	1,809.80		
Office Rent & Misc.	3,039.02		
Advertising and Other Exp.	55,047.46		
		120,989.58	
			$ 185,019.88
			$ 646,325.79
Misc. Claim Adjustment,			1.84
NET AMOUNT LIQUIDATION			- $ 646,327.63

The Partnership of A. Overholt & Co. consisted of A.W.Mellon, R.B. Mellon and Henry C. Frick and was created on December 30, 1918, for the purpose of liquidating the assets of A.Overholt & Co., a Pennsylvania corporation.

Mr. Frick died on December 4, 1919, and, under the laws of the State of Pennsylvania, Messrs. A.W. and R.B.Mellon were, as surviving partners, required to carry on the liquidation of the assets of the copartnership.

On February 1, 1921, Messrs. Mellon, as liquidating partners, transferred all of the assets, real, personal and mixed of the copartnership, to The Union Trust Company of Pittsburgh, as liquidating agent.

a5

(c) General class (use key letter designation) J.

(d) Main income producing business. Give specifically the information called f
also whether acting as principal or as agent, on commission. State if inactive

Storage of Whiskey - Bottling for
Sale of Purchased Whiskey from cor
same name - Partnership in Liqui

A personal service corporation must explain its business in sufficient detail to ju
If the character of the business is different from that carried on during the pr
nature of the change must be explained. Where necessary, the statement shou
which should be firmly attached to this return.

OTHER CONCERNS IN SAME BUSINESS.

5. Attach hereto a list of the names and addresses of five representative concern
of the country engaged in the same kind of business.

ORGANIZATION OR INCORPORATION.

6. Date of organization or incorporation December 20, 19

7. If incorporated, under the laws of what State?

8. Is the corporation a successor to or was it formed to take over or conduct part
corporation? If so, state name and address of predecessor or other org
case, the financial, managerial, and contractual relationships existing between yourse
sation

VALUATIONS OF CAPITAL STOCK.

9. What was the fair value of the total capital stock of the corporation as determi
if any, of the capital stock tax?

Date of that assessment

AFFILIATIONS WITH CORPORATIONS.

10. Does the corporation own directly or control through wholly affiliated
nominees over 50 per cent of the outstanding voting capital stock of another corpora

11. Is over 50 per cent of your voting capital stock owned by another corporation
tions that are affiliated?

12. Is over 50 per cent of your voting capital stock as well as over 50 per cent of
another corporation or of other corporations owned or controlled by the same
the same individuals or partnerships?

SCHEDULE D—RE

1. Net income from Schedule A, Item 26 .....

2. Income not to be accounted for by members:
   (a) Interest on obligations of the United States issued b
   ber 1, 1917, Victory Liberty Loan 3½% Notes an
   of United States' possessions .....
   (b) Interest on obligations of States, Territories, and
   divisions thereof .....
   (c) Interest on Farm Loan Bonds issued under Federa
   Act .....
   (d) Dividends on stock of personal service corporati
   income earned during the period between January
   the beginning of present accounting period .....
   (e) Profits which are derived from the sale of vessels, a
   exempt under Section 28 of the Merchant Marine A
   (f) Other items (to be detailed):

   (1) .....

   (2) .....

3. Charges against reserves for bad debts, contingencies, etc. (to

   (a) .....

   (b) .....

   (c) .....

4. Total of Items 1 to 3, inclusive .....

5. Total from Item 13 .....

6. Net profit for period as shown by books, before any adj
   made therein (Item 4 minus Item 5) .....

7. Surplus and undivided profits as shown by balance shee
   preceding taxable period .....

8. Other credits to surplus (to be detailed):

   (a) .....

   (b) .....

9. Total of Items 6 to 8, inclusive .....

10. Total from 16 .....

11. Surplus and undivided profits as shown by balance shee
    accounting period (Item 9 minus Item 10) .....

Attach hereto balance sheets as of the beginni
balance sheets should be prepared from the books a

ASSETS.

Cash (including cash in bank and on hand, certificates of depos
Trade accounts (before deducting reserves for losses).
Notes receivable from customers.
Other accounts and notes receivable (to be classified).
Inventories:
  Raw materials.
  Work in progress.
  Finished products.
  Supplies.
Investments:
  Bonds—
    U. S. bonds and obligations (each issue to be stated sepa
    Exempt (municipal, State, etc.).
    Other.
  Stock of corporations—
    Foreign.
    Domestic.
Loans and advances:
  To members and employees.
  To others.
Deferred charges to future operations (to be detailed.)

KIND OF BUSIN

1. By comment use key letters given below, identify the cor
some of the general classes, and follow this by a special description
called for under each general class:
A—Agriculture and related industries, including fishing, lo
of such property. State the product or products. B—Minin
include the leasing of such property. State the product or pr
and also the material if not implied by the name of the prod
bridges, railroads, ships, etc., also equipping and installing sam
their manufacture. State nature of structures built, materials
tion—rail, water, local, etc. State the kind and special produc
(natural, coal or water); electric light or power (hydro or steam
phone; waterworks or power. E3—Storage—without trading
yards, etc.) State product stored. E4—Leasing transportat
Trading in goods bought and not produced by the trading conce
retail, or commission, and the product handled. Sales with stora
domestic, including hotels, restaurants, etc.; amusements; oth
State the service. H—Finance, including banking, real estat
classes (a) because of combining several of them with no predon
2. Concerns whose business involves activity falling in two
same product is concerned, should report business as identified
example, concerns in A or B which also transport and market t
still be identified with classes A or B; concerns in C (manufactur
supply in A or B and which also transport, sell, or install thei
identified with manufacturing; concerns in D may control or ow
or mainly in their constructive work; concerns in E1 or E2 ma
power; concerns in F may transport or store their own merch
with A, B or C.
3. Answers:
   (a) General class (use key letter designation) ..... F.
   (b) Main income producing business. Give specifically th
   also whether acting as principal or as agent, on commis

SCHEDULE "E" - BALANCE SHEETS.

A. OVERHOLT & COMPANY.
PITTSBURGH, PA.

ASSETS.		Dec.31,1920	Jan.1,1920.
Cash,	Overdraft	($ 7,039.13)	1,667.17
Bills Receivable,		2,665,600.00	1,915,000.00
Accts. Rec. & Tax,		358,033.98	360,008.88
Inventories,		867,220.27	900,395.52
Investments:			
Liberty Loan Bonds,		--- --	105,000.00
Miller Property,		6,817.81	6,817.81
		6,817.81	111,817.81
Property & Plant,		253,261.27	253,261.27
Expenses' Paid in Advance,		8,438.01	10,324.80
		3,952,332.21	3,552,475.45

LIABILITIES			
Accounts Payable,		9,370.06	192,610.85
Reserves:			
Depreciation,		260,000.00	260,000.00
Capital Stock Tax & Other Taxes,		10,276.54	20,000.00
Inventory Depreciation 1919.			198,558.85
Liquidation,		646,327.63	-- --
Profit & Loss 1920.		145,052.23	3,672,685.61 -- --
NET WORTH PARTNERS FOR LIQUIDATION			
R.B. Mellon,		960,435.25	960,435.25
A.W. Mellon,		960,435.25	960,435.25
Estate of H.C.Frick,		960,435.25	960,435.25
		$ 3,952,332.21	$ 3,552,475.45

a 6

A. OVERHOLT & CO. - PITTSBURGH, PA.

SCHEDULE A-5 - GROSS INCOME FROM OPERATIONS OTHER THAN MANUFACTURING.

SALES:

Empty Barrels,	-	$ 6,[illegible].51	
Bottling & Casing —	-	320,[illegible].61	
Storage billed,	-	[illegible].50	
			$[illegible].42

COSTS CHARGED TO SALES:

Labor,	$ 12,[illegible].41	
Revenue Stamps, —	8,080.90	
Cases, Bottles, Corks, and other bottling supplies,	150,922.51	
Water & Other Expenses,	10,[illegible].82	$ 182,[illegible].60

Storage Labor & Expenses, [illegible]

[illegible]

A. OVERHOLT & COMPANY, PITTSBURGH, PA.

SCHEDULE A-5 - TAXABLE INTEREST.

Interest on Daily Balances - Mellon Nat.Bank	-	$ 3,480.73

SCHEDULE A-15 - ORDINARY & NECESSARY EXPENSES.

Salaries,	$ 14,302.02
Broad Ford Office Expenses,	1,809.80
Office Rent, Incidentals, etc.	3,039.01
[illegible],	85.12
TOTAL -	$ 19,235.95

[illegible] - SALE OF INVESTMENTS OR ASSETS.

Third Liberty Loan 4 1/4 Bonds

Purchase Price, - $ 105,000.00

Acquired 1918.

Sold to Mellon National Bank, Pittsburgh, Pa.- Jan. 21, 1920.

Sale Price (Includes all accrued interest)- 99,671.25

NET LOSS - $ 5,328.75

28

[redacted]

SCHEDULE A-14 - COMPENSATION OF MEMBERS OF PARTNERSHIP.

R.B. Mellen, Managing Partner, Part Time - $5,000.00 annually.

a9

PARTNERSHIP AND PERSONAL SERVICE CORPORATION RETURN OF INCOME

FOR CALENDAR YEAR 1920 or fiscal year beginning ____, 1920, and ending DEC 31 1920, 1920

WEST OVERTON DISTILLING CO.
Scottdale, Pa.

23rd PENNSYLVANIA

RECD - 14158
MAR 16 1921
23rd Dist. PENNA.

BUSINESS Distilling STATE WHETHER PARTNERSHIP OR CORPORATION Partnership

SCHEDULE A—INCOME TO BE ACCOUNTED FOR BY MEMBERS.

GROSS INCOME

s, less returns and allowances		$ 47729 00		
of goods sold, exclusive of expenses, repairs, and other items called for separately from Schedule A2)		20127 92	$ 27601 08	
me from services or from operations other than trading or manufacturing, less allowances (from Schedule A3)				
n obligations of the United States issued since September 1, 1917 (except Victory Liberty Loan 3½% Notes), and ance Corporation Bonds (from Schedule B, see Schedule A4)				
nterest from all other sources (not including interest referred to under Item 2, Schedule D) (from Schedule A5)			134 40	
et income earned by a partnership or personal service corporation during its accounting period (whether received s from earnings of corporations taxable by the United States on their net incomes (including dividends on stock of l service corporations declared out of profits earned prior to January 1, 1918) (from Schedule A9)				
s on stock of foreign corporations not taxable by the United States on their net incomes (from Schedule A10)				
me from all other sources (not including any amount reported in Item 28 below) (from Schedule A11)				
TAL OF ITEMS 1 TO 11				$ 27735 48

DEDUCTIONS

nd necessary expenses (except amounts reported in Item 2 above or called for separately below) (from Schedule		$ 7594 77		
ion of members (including shareholders of personal service corporation who drew salaries therefrom and salaries, ions, and other compensation in whatever form paid) (from Schedule A14)				
including labor, supplies, etc.) (from Schedule A15)				
from Schedule A16)				
cept Federal income and profits taxes, and taxes which are a credit under Section 222 or Section 238, and taxes l against local benefits of a kind tending to increase the value of the property assessed)				
rtained to be worthless and charged off during accounting period (from Schedule A18)		759 17		
n, wear and tear (including obsolescence) (from Schedule A19)		1500 00		
(from Schedule A20)				
TAL OF ITEMS 13 TO 20				$ 1 859 94
DIFFERENCE BETWEEN ITEMS 12 AND 21				$ 17 875 54
s on sales of capital assets and miscellaneous investments, including liquidating dividends (from Schedule A22)	$			
ained during accounting period and not compensated for by insurance or otherwise (from Schedule A23)				
on of War Facilities (from Schedule A24). (Extend to last column resulting net total of Items 22, 24, and 25)				
E FOR ACCOUNTING PERIOD TO BE ACCOUNTED FOR BY MEMBERS (TOTAL OF OR DIFFERENCE BETWEEN ITEMS 22)				$ 17 875 54

SCHEDULE B—INTEREST ON LIBERTY BONDS, ETC.

Name										
Date										
Amount of Interest	$	$	$	$	$	$	$	$	$	$

Total, Interest on Any Obligations as Shown Above (to be entered on Item 4, Schedule A, and distributed in column 5, Schedule C) $

Amount of Victory Liberty Loan 3½% and 4½% Notes originally subscribed for and still owned at the date of filing this return $

Amount of Fourth Liberty Loan 4¼% Bonds originally subscribed for and still owned at the date of filing this return $

SCHEDULE C—MEMBERS' SHARES OF INCOME, ETC.

Enter below the share of net income (whether distributed or not) of each member of the partnership, or shareholder of the personal service corporation, and each member's share of the said profits upon paid by the partnership or corporation to a foreign country or to a possession of the United States. (See page 1 of instructions, paragraphs 10 to 14, inclusive.)

1. Name and address of each, as shown on individual returns	2. Interest in net profits as shown by Item 5, Schedule A	3. Amount on line 1, Schedule A	4. Other income	5. Income and profits taxes paid to a foreign country or to a possession of the U. S.
Richard B. Mellon				
700 - 5th Ave. Pittsburg, Pa.	1/3		596055	Profit
Andrew W. Mellon				
Woodland Road, Pittsburg, Pa.	1/3		596055	Profit
R. Fries Estate				
Pittsburg, Pa.	1/3		596054	Profit
Totals			1788164	

I, [illegible], being severally duly sworn, each for himself deposes and says that he is the person [illegible] who subscribed the foregoing [illegible] schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made pursuant to the Revenue Act of 1918 and the Regulations thereunder.

Subscribed and sworn to before me this [illegible] day of [illegible]

My Commission Expires February 21, 1923

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SCHEDULE D—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS.

ome from Schedule A, Item 28	$	17 8 81 64
not to be accounted for by members:		
terest on obligations of the United States issued before September 1, 1917, Treasury Bonds, 2½ % Notes and obligations in United States possessions		
terest on obligations of States, Territories, and political subdivisions thereof		
terest on Farm Loan Bonds issued under Federal Farm Loan Act		
Dividends on stock of personal service corporations from net income earned during the period between January 1, 1918, and the beginning of present accounting period		
Profits which are derived from the sale of vessels, and which are exempt under Section 23 of the Merchant Marine Act of 1920		
Other Items (to be detailed):		
(1)		
(2)		
s against reserves for bad debts, contingencies, etc. (to be detailed):		
)		
)		
)		
of Items 1 to 3, inclusive	$	
from Item 13		
profit for period as shown by books, before any adjustments are de therein (Item 4 minus Item 5)	$	
us and undivided profits as shown by balance sheet at close of ending taxable period		
r credits to surplus (to be detailed):		
of Items 6 to 8, inclusive	$	
from 16		
ius and undivided profits as shown by balance sheet at close of ounting period (Item 9 minus Item 10)	$	17 8 81 64

12. Unallowable deductions:		
(a) Donations, gratuities, and contributions	$	
(b) Income and profits taxes paid to the United States, its possessions or a foreign country		
(c) Special improvement taxes tending to increase the value of the property assessed		
(d) Furniture and fixtures, additions, or betterments treated as expenses on the books		
(e) Replacements and renewals		
(f) Insurance premiums paid on the life of any officer or [illegible] the benefit of the corporation or business		
(g) Interest on indebtedness incurred or continued to purchase [illegible] securities (other than obligations of the United States issued after September 24, 1917), the interest upon which is wholly exempt from taxation		
(h) Additions to sinking fund reserve, and reserves for bad debts and other contingencies (to be detailed):		
(1)		
(2)		
(3)		
(i) Other unallowable deductions (to be detailed):		
(1)		
(2)		
(3)		
13. Total of Item 12	$	
14. Dividends or withdrawals (state whether paid in cash, stock of this company, or other property):		
(a) Date paid ..... Character	$	
(b) Date paid ..... Character		
(c) Date paid ..... Character		
(d) Date paid ..... Character		
15. Other debits to surplus (to be detailed):		
(a)		
(b)		
13. Total of Items 14 and 15	$	

SCHEDULE E—BALANCE SHEETS.

tach hereto balance sheets as of the beginning and end of the taxable year (preferably in parallel columns), showing as nearly as practicable the details called for below: (These e sheets should be prepared from the books and should be in agreement therewith, or any differences should be reconciled.)

ASSETS.

cluding cash in bank and on hand, certificates of deposit, etc.).
counts (before deducting reserves for losses).
eivable from customers.
counts and notes receivable (to be classified).
ks:
materials.
k in progress.
shed products.
plies.
ents:
do
U. S. bonds and obligations (each issue to be stated separately).
Exempt (municipal, State, etc.).
Other.
k of corporations:
Foreign.
Domestic.
nd advances:
mbers and employees.
thers.
d charges to future operations (to be detailed.)

ASSETS (Continued).

Fixed assets:
Land.
Buildings.
Machinery.
Tools and minor equipment.
Delivery equipment.
Office furniture.
Other (state character).
TOTAL.
Less reserves for depreciation and depletion (show separately amount applicable to each fixed asset).*
NET VALUE.
Patents, good will, and other intangible assets:
Paid for in cash or other tangible property.
Paid for in stock (other than stock dividends) or in shares of a partnership.
Created by stock dividend or otherwise.
Discount:
On bonds.
On stock.
TOTAL.

LIABILITIES.

Loans and notes payable:
To members.
To others (including bank loans).

Accounts payable:
Trade.
Other.

Accrued expenses and reserves, the charges creating which are allowable deductions from income (to be detailed).

Reserves, the charges creating which are not allowable deductions from income (to be detailed):
Reserves for losses on notes and accounts receivable.
Other reserves (to be detailed).

Capital stock outstanding (to be classified), or all partners' capital and current accounts (to be detailed).

Surplus and undivided profits.

TOTAL.

*Reserves for depreciation may be deducted from the respective asset accounts or itemized on the liability side of the balance sheet.

QUESTIONS.

KIND OF BUSINESS.

y means of the key letters given below, identify the corporation's main income producing activity with e general classes, and follow this by a special description of the business, sufficient to give the information r under each general class:
Agriculture and related industries, including fishing, logging, ice harvesting, etc., including the leasing property. State the product or products. B—Mining and quarrying, including gas and oil wells. The leasing of such property. State the product or products. C—Manufacturing. State the product the material if not implied by the name of the product. D—Construction—excavations, buildings, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without nufacture. State nature of structures built, materials used or kind of installations. E1—Transporta- il, water, local, etc. State the kind and special product transported, if any. E2—Public utilities—gas , coal or water); electric light or power (hydro or steam generated); heating (steam or hot water); tele- aterworks or power. E3—Storage—without trading or profit from sales (elevator, warehouses, stock- e.) State product stored. E4—Leasing transportation or utilities. State kind of property. F— n goods bought and not produced by the trading concern. State manner of trade, whether wholesale, commission, and the product handled. Sales with storage with profit primarily from sales. G—Service— , including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. e service. H—Finance, including banking, real estate, insurance. I—Concerns not falling in above a) because of combining several of them with no predominant business, or (b) for other reasons.
oncerns whose business involves activity falling in two or more of the above general classes, where the gle is concerned, should report business as identified with but one of the above general classes, for-

13. If the answer to questions 10, 11, and 12, or any of them, is "yes," the following information should be furnished as at the beginning of the accounting period, indicating any substantial changes during such period:

NAME OF SHAREHOLDER.	(Name of corporation) (Address)		(Name of corporation) (Address)	
	Shares held.	Percentage of stockholdings.	Shares held.	Percentage of stockholdings.

...service. H—Finance, including banking, real estate, insurance. I—Concerns not falling in above (a) because of combining several of them with no predominant business, or (b) for other reasons. Concerns whose business involves activity falling in two or more of the above general classes, where the product is concerned, should report business as identified with but one of the above general classes, for ..., concerns in A or B which also transport and market their own product exclusively or mainly, should identified with classes A or B; concerns in C (manufacturing) which own or control their source of material in A or B and which also transport, sell, or install their own product exclusively or mainly, should be ed with manufacturing; concerns in D may control or own source of supply of materials used exclusively ly in their constructive work; concerns in E1 or E2 may own or control the source of their material or concerns in F may transport or store their own merchandise, but its production would identify them , B or C.

Answers:

General class (use key letter designation) F

Main income producing business. Give specifically the information called for under each key letter, also whether acting as principal or as agent, on commission. State if inactive or in liquidation.

In Liquidation

personal service corporation must explain its business in sufficient detail to justify its claim to be classed If the character of the business is different from that carried on during the preceding accounting period, ure of the change must be explained. Where necessary, the statement should be made on a separate hich should be firmly attached to this return.

OTHER CONCERNS IN SAME BUSINESS.

ttach hereto a list of the names and addresses of five representative concerns in your locality or section untry engaged in the same kind of business.

ORGANIZATION OR INCORPORATION.

ate of organization or incorporation Dec. 31 - 1918

f incorporated, under the laws of what State?

the corporation a successor to or was it formed to take over or conduct part of the business of another

ion? If so, state name and address of predecessor or other organization, and in the latter financial, managerial, and contractual relationships existing between yourselves and the other organi-

Heat Ometer Distilling Co.

VALUATIONS OF CAPITAL STOCK.

hat was the fair value of the total capital stock of the corporation as determined in the last assessment,

f the capital stock tax?

last assessment

AFFILIATIONS WITH CORPORATIONS.

oes the corporation own directly or control through closely affiliated interests or by a nominee or over 50 per cent of the outstanding voting capital stock of another corporation?

over 50 per cent of your voting capital stock owned by another corporation or by two or more corpora- are affiliated?

over 50 per cent of your voting capital stock as well as over 50 per cent of the voting capital stock of orporation or of other corporations owned or controlled by the same individual or partnership or by individuals or partnerships?

Total				
Shares outstanding beginning of year				
Shares outstanding end of year				

(a) Separate statements should be submitted for common and preferred stock, indicating (1) whether it had full voting privileges during the entire accounting period; (2) whether the voting privileges were suspended; (3) whether these voting privileges were exercised during the accounting period; (4) the conditions by which these voting privileges may be restored or acquired.

(b) State the dividend privileges of the respective classes of stock; the rate of dividends paid during the accounting period; the date and rate of last dividend payment; and whether, and under what conditions, the preferred stock participates in the earnings above the fixed dividend rate.

(c) State if the preferred stock has preference in respect to distribution of assets, dividends or otherwise.

(d) Show separately the number of shares of each class held by the respective subscribers of such stock, except where impracticable by reason of the large number of subscribers. Under such conditions show only those holding stock in two or more of the affiliated corporations.

(e) Indicate whether any of the stock was held during the accounting period subject to [illegible] by agreement, expressed or implied, and state whether such arrangements are now in force.

(f) Indicate whether any stock is held by employees or officials as a part of their compensation, and if so, state the number of shares so held, the names of the holders, the amounts paid for such stock by the holders, and the conditions, either expressed or implied, under which such stock was purchased and is held. Also state the number of shares of such stock issued during the accounting period. Also submit the following information in respect to such stock issued during the accounting period and not at the time of acquisition: (1) Par value of stock; (2) book value of stock; (3) market value of stock; (4) actual consideration or amount paid for such stock; (5) method of payment for such stock.

(g) If the stock in any one or more of the corporations listed in answering [illegible] of such corporations, state the relations existing between the various corporations whose stock is held by [illegible] by ownership or otherwise.

(h) Explain fully the nature and extent of any [illegible] of the capital stock of any of the corporations listed in answering [illegible] an artificial distribution of profits or assets to any one of the corporations [illegible] net income or invested capital.

Foreign corporations may not be included in consolidations.

GOVERNMENT CONTRACTS.

14. Have any adjustments during the accounting period been made or entered into affecting or relating to with the Government or its agencies or from any Government contract or subcontract, whether [illegible] directly or indirectly, through the operations of a claim board or otherwise? (Answer "Yes" or "No.") If so, state the amounts involved, $; whether or not such [illegible] return; and, if not, was an amended return accounting for the [illegible] for accounting period in which the contract was [illegible] particulars of the contract, date entered into, date the work ceased under said contract or subcontract, and the amount and nature of the adjustment.

AMORTIZATION.

15. Has amortization been claimed? (Answer "Yes" or "No.") If so, for what year Amount, $

PREPARATION OF RETURN.

16. Was anyone employed especially to prepare or advise in the preparation of this return? (Answer "Yes" or "No.") No If so, give name and address and state to what extent such assistance or advice was received

LIST OF ATTACHED SCHEDULES.

17. Attach a list of schedules accompanying this return, giving for each a brief title and a [illegible] number. (See opening paragraph on page 2 of instructions.)

AMENDED RETURNS.

An amended return must be plainly marked "Amended" across the face of [illegible]

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AUG - 9 1922

IF RETURN IS FOR CALENDAR YEAR 1922 FILE IT WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1923

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR, THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

KIND OF BUSINESS

1. Gross sales, less returns and allowances
2. Less cost of goods sold, exclusive of exp... below (from Schedule A2)
3. Gross income from services or from opera...
4. Interest on obligations of the United St... War Finance Corporation Bonds (from...
5. Taxable interest from all other sources (...
6. Rentals
7. Royalties
8. Share of net income earned by a partners... or not)
9. Dividends from earnings of corporations ... personal service corporations declared o...
10. Dividends on stock of foreign corporation...
11. Gross income from all other sources (not i...
12. TOTAL OF ITEMS 1 TO 11
13. Ordinary and necessary expenses (except ... A13)
14. Compensation of members (including shar... commissions, and other compensation in...
15. Repairs (including labor, supplies, etc.) (...
16. Interest (from Schedule A16)
17. Taxes (except Federal income and profits ... assessed against local benefits of a kind ...
18. Debts ascertained to be worthless and cha...
19. Exhaustion, wear and tear (including obs...
20. Depletion (from Schedule A20)
21. TOTAL OF ITEMS 13 TO 20
22. DIFFERENCE BETWEEN ITEMS 12 AN...
23. Profit or loss on sales of capital assets and n...
24. Losses sustained during accounting period ...
25. Amortization of War Facilities (from Sched...
26. NET INCOME FOR ACCOUNTING PERIOD TO ... 22 AND ITEM 25)

OBLIGATIONS	First Liberty Loan Converted 4% Bonds of 1932-47.	Second L... Loan 4%... of 19...
INTEREST DATES	June 15. December 15.	May ... Novem...

Obligations	First Liberty Loan Converted 4% Bonds of 1932-47.	Second Liberty Loan 4% Bonds of 1927-42.	
Interest Dates	June 15. December 15.	May 15. November 15.	
Amount of interest	$	$	$

Total Interest on All Obligations as Shown

State the amount of Victory Liberty Loan 3¾% and 4¼%

State the amount of Fourth Liberty Loan 4¼% Bonds on

S

Enter below the shares of net income (whether distr
any income and profits taxes paid by the partnership or c
If the distributable interests in the net income are

I. Name and address of each, as shown on the

(a) Richard B. Mellon
(b) 6500 - 5th Ave., Pittsburg
(c)
(d) Andrew W. Mellon
(e) Woodland Road, Pittsburg
(f)
(g) H. C. Frick Estate
(h) Pittsburg, Pa.
(i) Totals

The undersigned, being severally duly sworn, each
and is to the best of his knowledge and belief a true and
issued under authority thereof.

Sworn to and subscribed before me this

Seal of officer
making affidavit

My Commission E
February 21, 1

SCHEDULE D—RECONCIL

1. Net income from Schedule A, Item 28 .....

2. Income not to be accounted for by taxpayer:
   (a) Interest on obligations of the United States issued before Septem
   ber 1, 1917, January 1918 Loan 4½ % Notes and obligation
   of United States, etc. .....
   (b) Interest on obligations of States, Territories, and political sub
   divisions thereof .....
   (c) Interest on Farm Loan Bonds issued under Federal Farm Loa
   Act .....
   (d) Dividends on stock of personal service corporations from ne
   income earned during the period between January 1, 1918, an
   the beginning of present accounting period .....
   (e) Profits which are derived from the sale of vessels, and which ar
   exempt under Section 23 of the Merchant Marine Act of 1920 ...
   (f) Other Items (to be detailed):

   (1) .....

   (2) .....

3. Charges against reserves for bad debts, contingencies, etc. (to be detailed

   (a) .....

   (b) .....

   (c) .....

4. Total of Items 1 to 3, inclusive .....

5. Total from Item 13 .....
6. Net profit for period as shown by books, before any adjustments a
   made therein (Item 4 minus Item 5) .....
7. Surplus and undivided profits as shown by balance sheet at close
   preceding taxable period .....

8. Other credits to surplus (to be detailed):

   (a) .....

   (b) .....

9. Total of Items 6 to 8, inclusive .....

10. Total from 16 .....
11. Surplus and undivided profits as shown by balance sheet at close
    accounting period (Item 9 minus Item 10) .....

Attach hereto balance sheets as of the beginning and en
balance sheets should be prepared from the books and should

ASSETS.

Cash (including cash in bank and on hand, certificates of deposit, etc.).
Trade accounts (before deducting reserves for losses).
Notes receivable from customers.
Other accounts and notes receivable (to be classified).
Inventories:
  Raw materials.
  Work in progress.
  Finished products.
  Supplies.
Investments:
  Bonds—
    U. S. bonds and obligations (each issue to be stated separately).
    Exempt (municipal, State, etc.).
    Other.
  Stock of corporations—
    Foreign.
    Domestic.
Loans and advances:
  To members and employees.
  To others.
Deferred charges to future operations (to be detailed.)

*Reserves for depreciation

KIND OF BUSINESS.

1. By means of the key letters given below, identify the corporation's m
one of the general classes, and follow this by a special description of the busin
called for under each general class:

A—Agriculture and related industries, including fishing, logging, ice ha
of such property. State the product or products. B—Mining and quar
Include the leasing of such property. State the product or products. C—
and also the material if not implied by the name of the product. D—C
bridges, railroads, ships, etc., also equipping and installing same with syst
their manufacture. State nature of structures built, materials used or kin
tion—rail, water, local, etc. State the kind and special product transport
(natural, coal or water); electric light or power (hydro or steam generated)
phone; waterworks or power. E3—Storage—without trading or profit fro
yards, etc.) State product stored. E4—Leasing transportation or utili
Trading in goods bought and not produced by the trading concern. State
retail, or commission, and the product handled. Sales with storage with prod
domestic, including hotels, restaurants, etc.; amusements; other professi
State the service. H—Finance, including banking, real estate, insuranc
classes (*a*) because of combining several of them with no predominant busi

2. Concerns whose business involves activity falling in two or more of
same product is concerned, should report business as identified with but
example, concerns in A or B which also transport and market their own p
still be identified with classes A or B; concerns in C (manufacturing) which
supply in A or B and which also transport, sell, or install their own prod
identified with manufacturing; concerns in D may control or own source of
or mainly in their constructive work; concerns in E1 or E2 may own or c
power; concerns in F may transport or store their own merchandise, but
with A, B or C.

supply in A or B and which also transport, sell, or install their ow
identified with manufacturing; concerns in D may control or own s
or mainly in their constructive work; concerns in E1 or E2 may o
power; concerns in F may transport or store their own merchandi
with A, B or C.

3. Answers:

(a) General class (use key letter designation).....

(b) Main income producing business. Give specifically the in
also whether acting as principal or as agent, on commission.

.....

.....

.....

4. A personal service corporation must explain its business in su
as such. If the character of the business is different from that carried
the nature of the change must be explained. Where necessary, t
sheet, which should be firmly attached to this return.

OTHER CONCERNS IN SAME

5. Attach hereto a list of the names and addresses of five repr
of the country engaged in the same kind of business.

ORGANIZATION OR INCORP

6. Date of organization or incorporation.....

7. If incorporated, under the laws of what State?.....

8. Is the corporation a successor to or was it formed to take ove

corporation?..... If so, state name and address of prede
case, the financial, managerial, and contractual relationships existin

zation .....

.....

.....

VALUATIONS OF CAPITAL

9. What was the fair value of the total capital stock of the corpo

if any, of the capital stock tax?.....

Date of that assessment.....

AFFILIATIONS WITH CORPO

10. Does the corporation own directly or control through clos
nominees over 50 per cent of the outstanding voting capital stock o

11. Is over 50 per cent of your voting capital stock owned by and
tions that are affiliated?.....

12. Is over 50 per cent of your voting capital stock as well as ov
another corporation or of other corporations owned or controlled by
the same individuals or partnerships?.....

Schedule — BALANCE Sheet.

JAN. 1 1920 Assets		JAN. 1 1920 Liabilities			DEC. 31. 1920 Assets		DEC. 31. 1920 Liabilities	
		353	11	Bank	196 587	60		
4	18			Accounts Receivable	149	50		
14860	77			Inventoried - Supplies	13764	53		
90965	83			" Raw Materials	63650	27		
10000	00			Investments - Liberty Bonds	7414	80		
				Deferred Charges				
1509	38			Accrued Taxes	1017	94		
365	28			Fuel	673	09		
3209	36			Unearned Insurance	3068	21		
58	69			Licenses				
22	50			Water Rent - Hydrants	22	50		
251	62			Jury Fees				
50000	00			Real Estate Fund Plant 50000.				
				Less 3% Depreciation 1500	48500	00		
		56964	88	Surplus - H. C. Fleck			56964	88
		56964	88	" - A. H. Mellon			56964	88
		56964	86	" - R. B. Mellon			56964	86
				Liquidation			[illegible]	21
				Profit & Loss			17111	64
171247	73	171247	73		327433	64	327433	64

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B3

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PAGE

Testimony of Dewalt J. Hicks.

Thereupon, Dewalt J. Hicks was called as a witness on behalf of the plaintiffs and, having been first duly sworn, was examined and testified in substance as follows:

Direct Examination:

By Mr. Booth:

My full name is Dewalt J. Hicks. I live on Douglas Avenue in Pittsburgh, and was employed by the corporations known as A. Overholt & Company and West Overton Distilling Company from 1907 to 1925. I was the treasurer of A. Overholt & Company, and I am familiar with its affairs and its businesses. I was employed by the partnership after it took over the assets of the company, and after the death of Mr. Frick my employment was continued by the surviving partners. I continued in the same employment after the Union Trust Company of Pittsburgh was appointed liquidating agent. I really hadn't any connection with the West Overton Distilling Company except to oversee what was going on. That plant was attended to by Mr. Bosworth. All things that came into my office were approved before anything was done by either the A. Overholt & Company or West Overton Distilling Company. I approved everything that was done at the West Overton Distilling Company. Mr. R. B. Mellon had charge of the business of the two distilleries and everything that I approved was done with his direction. In December, 1916, we stopped the distillation of whiskey. After 1916 we never applied

for a distiller's license or permit although we had the necessary licenses and permits up to that time. After the passage of the War-Time Prohibition Act and the National Prohibition Act, we applied to the Federal Government for wholesale and retail licenses but not for a distiller's permit. All of my testimony applies to both the A. Overholt plant and the West Overton plant. No whiskey was manufactured after the formation of the partnership. After the partnership was formed, we sold whiskey on certificate. Whiskey was withdrawn through the Federal Government; the distiller had to make application, because the Government wouldn't recognize anybody but a distiller; we would make application for withdrawal, and then withdraw it and bottle it for the owner of the certificate.

Q. Did you do any bottling except of the whiskey that was stored in the warehouse?

A. No.

Q. Was that carried on all through the years from 1919 to 1925?

Mr. Eustace:

That is objected to, as calling for a conclusion of the witness, and not the best evidence; leading, and suggestive.

The Court:

I will overrule that objection, and note an exception.

A. Yes.

Q. Was there a profit made out of bottling?

A. There was a profit made on bottling.

Mr. Eustace:

That is objected to as leading and suggestive; and I make a motion to strike the answer.

The Court:

It generally gets us nowhere as it stands, of course; but it may lead to something more specific later. The objection is overruled, and exception noted.

A. We had profits for bottling.

We also charged for storage and for the sale of empty barrels.

Q. After the formation of the partnership, what if anything was done leading to the termination or winding up of the businesses?

A. Selling on certificate; we sold on certificate up until '21, all during 1920.

Q. After that what did you do?

A. Decided—the partnership decided not to sell anything unless they could sell the balance of the stock to some one person or concern.

Mr. Eustace:

Move to strike the answer to the last question, for the reason it does not appear it was confined to the year 1920, which is the only year in issue in this case.

The Court:

We deny the motion, and note an exception.

Q. In 1921—or until the final sale in 1925, had you any negotiations with anyone as to the sale of the entire plant?

Mr. Eustace:

That is objected to, as irrelevant and immaterial.

The Court:

The objection is overruled, and an exception.

A. We had several inquiries. Mr. Rosensteel—I think that was in 1922, but he made us no real offer; and Mr. Pell—

Q. Mr. Pell of New York, a broker, finally made the sale?

A. Yes.

Q. And prior to the final sale had he introduced you to any other purchaser?

A. Yes, he had.

Mr. Eustace:

If the Court please, may the record show that defendant objects to all such testimony as being offered by counsel from this witness.

The Court:

We will give you a general exception such as that, and note it specifically later in case it should be necessary.

Q. Was there any distribution of profits or of any money realized from the sale of whiskey made to the surviving partners or the estate of the deceased partner up until the year 1925?

A. No, sir.

Mr. Eustace:

This is objected to, as leading and suggestive, and calls for a conclusion of the witness, and not

the best evidence, and incompetent, irrelevant and immaterial.

Mr. Booth:

If the Court please, it is a pure question of fact as to whether or not they made any distribution to the partners, or the surviving partners.

The Court:

The question is as to the ability of the witness to answer. You have shown, I believe—or at least it is to be inferred from his testimony that he had the actual superintendence of this matter, under the direction of the partners. Am I correct in that?

Mr. Booth:

I will ask him another question.

Q. Mr. Hicks, who signed the checks making all disbursements of A. Overholt & Company?

A. What do you mean—as a partnership? I did.

Q. After the death of Mr. Frick, who signed them?

A. I did.

Q. Who signed them after the appointment of the liquidating agent?

A. The Union Trust Company.

Q. Who approved them before the Union Trust Company signed them?

A. I did; countersignature. I countersigned the checks.

Q. Do you know whether any distribution was

made to the surviving partners or the estate of the deceased partner?

A. Yes, sir.

Mr. Booth:

I renew the question.

The Court:

The objection is overruled, and exception noted.

Thereupon, the sixth immediately preceding question and answer were read as follows:

Q. Was there any distribution of profits or of any money realized from the sale of whiskey made to the surviving partners or the estate of the deceased partner up until the year 1925?

A. No, sir.

I know that during 1920 the A. Overholt & Company had debts. The partnerships or firms of A. Overholt & Company and West Overton Distilling Company kept books of account during the year 1920, and if there was any indebtedness of those two firms, such indebtedness would be recorded upon the books of account.

Q. Mr. Hicks, in 1920 were there any discussions in Washington by Government officials relating to the whiskey business—

A. Yes, sir.

Q. —which tended to make the business hazardous?

Mr. Eustace:

Just a moment.

The Court:

I wonder if you need any proof as to the general situation which existed at that time. I don't know whether you want to prove anything more than the general existing condition of affairs in connection with the business or not, but if you do, let us know what it is.

Mr. Booth:

I will withdraw the "which tended to make the business hazardous," and change it to "which might result in the expenditure of a large amount of money by distillers."

Mr. Eustace:

Objection.

Mr. Booth:

If the Court please, I offer to prove by this witness that in 1920 the Government at Washington was discussing three things: First, the assessment and imposition of a floor tax upon all whiskey then in storage in the United States; secondly, the movement of all whiskey then in storage to several large warehouses to be designated "concentration warehouses," and with that removal the assessment and imposition immediately of the $2.20 per gallon tax; thirdly, the possibility that all whiskey would have to be bottled, in order to stop or remove the possibility of theft from the barrels, and the assessment and immediate collection of the $2.20 per gallon tax with that bottling; that A. Overholt & Company and West Overton

Distilling Company had approximately 50,000 barrels of whiskey which would average thirty gallons per barrel, and that any one of such proposals if adopted would cost A. Overholt & Company three million dollars in tax immediately.

Mr. Eustace:

Objection is made to the offer, for the reason it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues involved in these cases; and for the further reason that the testimony or the proof offered is too general, and does not establish or tend to establish the question of whether or not there were debts and contingent liabilities, or the amounts of them.

The Court:

Now, you are simply offering this, I take it, Mr. Booth, for the purpose of showing a reason for liquidation?

Mr. Booth:

No. If the Court please, the offer is made for the purpose of showing there were large contingent liabilities in 1920 for these partnerships, and that under the law of the State of Pennsylvania surviving partners as liquidating trustees have no authority to make distribution to either themselves or the estate of a deceased partner until all the debts and liabilities of the former partnership are disposed of, satisfied or settled; and that such contingent liabilities prevented distribution of any of

the assets of these former partnerships to the partners, and that therefore no distribution could be made until these contingencies had been removed.

Mr. Eustace:

Further objection is made, that the offer of proof is not a tender of an issue of fact but a tender of an issue of law, and has no bearing whatsoever upon the right of the Government to levy and collect a tax for the year 1920.

The Court:

Well, the offer is rather indefinite, Mr. Booth. It does not show, in the first place, by whom such declarations were made, whether they were made to the plaintiffs or their partnership, and would be more or less intangible in any event, it seems to me. And I am not so sure that it is even necessary to prove that general situation; part of the condition is a matter for judicial notice—of which the Court might take judicial notice, I should say —and as to the law of Pennsylvania, of course you are not required to prove that in this court.

Mr. Frazer:

If the Court please, this offer is made for the purpose of showing the reason that no distribution was made earlier.

The Court:

That is what I inferred.

Mr. Frazer:

The liquidation started really in 1918, Mr. Frick died in 1919, and the liquidation continued,

and it was not until 1925 that the great bulk of the assets were sold and the distribution made; while some of the goods were sold earlier, no money realized from the sale of these assets was distributed, and this is the reason why it was not done.

The Court:

Well, isn't the fact more important than the reason?

Mr. Frazer:

That is perhaps correct. I was trying to explain to your Honor just the situation. In other words, we don't want the Government to be in position to say that we unreasonably withheld distribution of this property to the partners at any time, although as your Honor said I don't know whether it has a final bearing on the decision in this case.

Mr. Eustace:

Just in that connection, I might suggest to the Court that under the Federal Statute the income of a partnership is taxable to the individual partners, whether distributed or not; so that it is wholly immaterial, so far as the consideration of these issues is concerned, whether or not there was any distribution.

The Court:

Well, the effect of these statutes is, of course, largely a legal matter for determination at an-

other time. The main thing is to get the basis of facts upon which the legal matter is to be determined; I don't know. You may proceed, if you want to pursue it, and make it a little more specific. It is a matter known, I think, that is, a matter of common knowledge, and was a matter that was subsequently done, that is, the transfer to various warehouses.

Q. (Question read as amended, as follows: Mr. Hicks, in 1920 were there any discussions in Washington by Government officials relating to the whiskey business which might result in the expenditures of a large amount of money by distillers?)

The Court:

That is altogether too indefinite, Mr. Booth. You had better at least show it came from the head of the Internal Revenue Bureau, or the head of the Department. It might be the chief clerk in the office, or might be in the Attorney General's Office, or something of that kind; it might be a Government official, but his discussion would not have very much weight on the subject.

Mr. Booth:

The original question was whether or not there was any discussion, and he answered that yes.

The Court:

The objection is overruled to that extent, answer the question yes or no.

Mr. Eustace:

May I have an exception, please?

The Court:

Yes.

A. Yes.

Q. Was such discussion common knowledge among the men engaged in the whiskey business?

A. Yes.

Mr. Eustace:

Same objection.

The Court:

I think that will have to be sustained. An exception.

Q. Mr. Hicks, how much whiskey was there on hand in 1920?

Mr. Eustace:

That is objected to, as not the best evidence.

The Court:

It isn't the best evidence; but isn't it known, and checked up in that connection? It all has been, and there is no use taking up time with a mere matter concerning which there is no real dispute. No doubt you could get the books here, but it would simply take our time.

Mr. Eustace:

The books would establish the definite figure for the record, so that there would be no quibbling about any amounts or variations.

Mr. Booth:

The books are not the best evidence, they are only evidence of the facts, and a man who has knowledge can testify as easily as from the books.

The Court:

You could bring them here and show they were correctly kept, and a memorandum from the books, and so forth. That of course would be the best evidence. However, if this witness is able to state definitely, we will allow him to answer the question subject to the objection.

A. It would be pretty hard to state just exactly the amount, but I would say around sixty thousand in the two distilleries.

Q. Barrels?

A. Yes.

Mr. Eustace:

I move to strike the answer of the witness, because the question is not confined to a specific time.

The Court:

Yes, he did fix a specific time in his question. This is only a general matter. I will overrule the objection, and note an exception.

Cross Examination:

By Mr. Zeutzius:

The liquidation of the two businesses started with the formation of the partnership in 1918.

Q. Was the partnership formed for the purpose of liquidating the two businesses theretofore carried on by the two corporations?

A. Yes, sir.

Q. And for that particular purpose?

A. Yes, sir.

Q. Upon the death of Mr. Frick was there any change of policy with respect to liquidation?

A. No, sir.

Q. Was the same type of business and the same procedure continued as before, with the same end in view? Is that correct?

A. Yes, sir.

I was the treasurer of just the A. Overholt & Company during 1919 and 1920. With respect to the bank account of A. Overholt & Company in 1919 when the partnership was organized I signed all checks for all disbursements.

Q. That included any distribution to the partners?

A. There wasn't any distribution at all.

Q. Now, in what name was the bank account carried?

A. A. Overholt & Company.

Q. And by yourself as treasurer?

A. Yes, sir.

Q. Was any mention made of a partnership on the bank account or on the checks?

A. I don't think so.

Q. After the death of Mr. Frick, in December, 1919, was there any change made in the manner of carrying that bank account?

A. No, sir.

Q. Was the term "liquidating trustees" or "liquidating agents", or anything else, included on the bank account or on your checks of disbursement prior to the appointment of the liquidating agent?

A. "A. Overholt & Company".

Q. Just as it had been before the death of Mr. Frick. Is that correct?

A. Yes, sir.

Q. The businesses were carried on as before in the same offices?

A. Yes, sir.

Q. As prior to the death of Mr. Frick?

A. Yes, sir.

Q. Were there any changes made that you can remember, to indicate that the partnership no longer existed after the death of Mr. Frick and up to the time of the appointment of a liquidating trustee in 1921?

A. Will you ask that question again?

A. Nothing except that we were in liquidation, trying to dispose of our property.

Q. Did that appear by any external sign?

A. No.

What I just stated applies to the West Overton Distilling Company which was handled by Mr. Bosworth who is in court. I got my instructions as treasurer of the partnerships from R. B. Mellon during 1919 and 1920. Distilling operations, that is, manufacture, ceased in 1916. In 1917 and 1920 we didn't manufacture any. There was no difference in the operations as carried on in 1917, 1918, 1919 and 1920, except the bottling end of it. The books were kept under my direction by Mr. Wood of the A. Overholt & Company.

Re-direct Examination:

By Mr. Booth:

Q. Mr. Hicks, in 1917 and 1918, and up until July 1, 1919, you had free sales of whiskey?

Mr. Eustace:

I object, your Honor, as not coming within the purview of the cross examination.

Mr. Booth:

If the Court please, in cross examination the question was asked whether the business was the same in 1917 and '18 as in 1920.

The Court:

Go ahead.

Q. (Question read). In other words, your sales of whiskey were not restricted?

A. No, they were not.

Q. In 1920 they were restricted?

A. Yes, they were.

Q. Could you have started the manufacture of whiskey at any time during 1917 and 1918, if you had desired to do so?

A. Yes, sir.

Q. You were the man that said when distilling operations would begin and said when they would quit, were you not?

A. Yes, sir.

Q. When did you receive instructions, if ever, from the partners to do no more distilling?

A. December, 1916.

Q. When, if ever, did you receive instructions from the partners that you were to proceed to sell the assets as fast as possible and to find a purchaser for the entire plant, and to see to the winding up of the affairs of the partnerships?

A. Well, as far back as 1917, fall of '17.

Testimony of William A. Seifert.

Thereupon, William A. Seifert, was called as a witness on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Booth:

Q. Mr. Seifert, you are a practicing attorney?

A. Yes, sir.

Q. Admitted to practice in the bars of what courts?

A. Federal Courts and the State Courts.

Q. Supreme Court of the United States?

A. Yes, sir.

Q. How long have you been a practicing attorney?

A. Quite a long while; I think, going back to 1903.

Q. Have you in the course of your practice come in contact with the Bureau of Industrial Alcohol, Bureau of Prohibition, and Treasury Department, and the Office of the Attorney General of the United States?

A. From time to time; occasionally.

Q. Were you in 1920 attorney for the liquidating trustees and of Messrs. A. W. and R. B. Mellon, in conjunction with the A. Overholt & Company and West Overton Distilling Company?

Mr. Eustace:

That is objected to.

Mr. Booth:

I will withdraw the "liquidating trustees."

Q. (Question read, as amended, as follows: Were you in 1920 attorney for Messrs. A. W. and R. B. Mellon in conjunction with the A. Overholt & Company and West Overton Distilling Company?)

A. Mr. James H. Beal, former partner of Reed, Smith, Shaw and Beal, and myself were counsel for liquidating trustees of A. Overholt & Company and the West Overton Distilling Company during the year 1920.

Mr. Eustace:

I move to strike the answer, as not responsive to the question.

The Court:

Well, it brings in that "liquidating trustees" part; but I think I will refuse the motion and note you an exception.

Q. In connection with your duties were you during the year 1920 in Washington at numerous times?

A. Quite frequently.

Q. When there did you hear any rumors, definite or otherwise, in regard to certain proposed policies

which the Government might adopt in regard to imposition of a floor tax on whiskey, in regard to the requiring the removal of all whiskey to concentration warehouses, and in regard to requiring all whiskey to be bottled immediately?

Mr. Eustace:

Objected to, as argumentative; as incompetent, irrelevant and immaterial; and calls for a conclusion of the witness; and too general.

Mr. Booth:

If the Court please, that question was "Did you hear such rumors, definite or otherwise?" If he says no, it is over; if he says yes, then I can follow along and develop what they were and how definite they were, and the Court can then determine whether or not they are material.

The Court:

It is going out a little wider than it seems to me there is any necessity for going. That is capable of a direct declaration of reasons, of course, on the part of the parties. I will allow this question to be answered first, however, and note you an exception.

A. I did.

Q. Did you as attorney for Messrs. A. W. and R. B. Mellon advise them or their associate in regard to the distribution of profits or of the profits from the sale of whiskey of the two former partnerships, A. Overholt & Company and West Overton Distilling Company?

Mr. Eustace:

That is objected to, as irrelevant and immaterial, and not binding on the defendant.

The Court:

The objection is overruled, and exception noted.

A. As counsel with Mr. James H. Beal, we advised Mr. R. B. Mellon, who was the managing partner of A. Overholt & Company, partnership—managing partner of the surviving partners, A. W. Mellon and R. B. Mellon, of the West Overton Distilling Company and A. Overholt & Company, that no distribution could be made until certain questions had been settled—as definitely as we as counsel could advise them—about a possible floor tax, possible expense and tax involved in removing the whiskey to Government warehouses, should the Government require that, possible tax and expense involved in bottling the whiskey which was then in the distilleries at West Overton and A. Overholt & Company's plant at Broadford.

Mr. Eustace:

I move to strike the answer, as not responsive, and argumentative, and invading the province of the Court, and does not tend to prove or disprove any issue involved in this case.

The Court: The objection is overruled and exception noted.

Q. Would these matters have involved any amount of money, if they had been adopted by the Government?

A. They would have involved very large sums of money, sums of money larger than the company at that time would have been—or sums larger than the surviving partners at that time would have been able to have taken care of out of the then assets of the partnership.

Mr. Eustace:

Move to strike the answer and the question, as calling for a conclusion of the witness, and the answer itself showing that it is a conclusion, and not tending to prove or disprove any of the issues in this case.

The Court:

The fact that two and two make four is a conclusion, and this is almost the same thing, I take it; I will overrule your objection and note an exception, for the present.

Q. Did the fact that a tax might be assessed on all whiskey, either as a floor tax or as an Internal Revenue tax upon bottling, enter into your consideration in giving your advice to Messrs. A. W. and R. B. Mellon?

A. It certainly did.

Mr. Eustace:

That is objected to, as incompetent, irrelevant and immaterial.

The Court:

The objection is overruled and exception noted, for the present.

Q. Did you handle the income tax affairs for the former corporations, A. Overholt & Co. and West Overton Distilling Company?

A. I had charge of them, yes, sir.

Q. In 1920 had the Commissioner, or the Government, or the Collector asserted any deficiency against the two corporations for any years?

Mr. Eustace:

That is objected to, as not the best evidence, and calling for a conclusion of the witness.

The Court:

Well, it is certainly an easier way of getting at it than going through all the correspondence. It may have been merely a verbal declaration made to the witness on the part of the official. You have not stated that, as to the method; I would like that before I rule upon the other question.

Mr. Booth:

I think he could answer this question yes or no, and then develop those other facts.

The Court:

Well, those preliminary questions, of course, take up the other question, too. However, if you don't want to do it, I will sustain the objection and note an exception.

Q. Did you handle all the income tax matters of the two corporations?

A. I tried to, Mr. Booth.

Q. Were you personally present at all conferences with the Commissioner?

A. I think I attended all conferences which were conducted by the internal revenue agent from the Internal Revenue Agent's Office in Pittsburgh who made the examination of the income and excess profits tax returns of A. Overholt & Company and West Overton Distilling Company for the years 1917 and '18 and the income tax return for the two corporations for the year 1916; also attended, I think, all the conferences which were conducted in Washington in connection with the settlement and the final disposition of the tax matters of the A. Overholt & Company and West Overton Distilling Company, which filed consolidated returns for the year 1918 of income and excess profits taxes, and separate and consolidated income tax return for the year '17 of A. Overholt and West Overton, and separate excess profits tax returns.

Q. Do you personally know whether or not the Commissioner asserted a deficiency against the two corporations for the years '16, '17 and '18, whether or not the deficiency was subsequently increased or decreased, when the deficiency was paid, if at all, and when the tax matters of the corporations were finally settled? The question is, do you know personally those facts?

Mr. Eustace:

That is objected to, as immaterial and irrelevant.

The Court:

Well, there are a number of things you can answer "I do" or "I don't." It includes too many; I never like that form of question myself.

Mr. Booth:

It is our contention that letters of the Commissioner are not necessarily the best evidence.

The Court:

We are talking about a little different thing though. Mr. Seifert has not been able to follow you,—you put a number of different elements into your question. Out of the five or six he may know one or two and not know as to the other; so it makes it difficult to answer. If put specifically as to each, it would be very much easier and more satisfactory.

Q. Do you personally know whether the Commissioner declared a deficiency in income tax against the two corporations for any of the years 1916, '17 or '18?

A. I know that the Commissioner—

Q. Just answer whether you know or not?

A. If you mean by "asserting deficiency" proposing deficiency in letters which were addressed to the corporations, I will answer that question yes.

Mr. Eustace:

I move to strike the answer, as not responsive.

The Court:

I think it is. Objection overruled and exception noted.

Q. Do you personally know the approximate amount of those deficiencies?

A. I do.

Q. Approximately what do they amount to?

Mr. Eustace:

That is objected to, for the reason it is immaterial and irrelevant to the issues involved in this case, what deficiencies may have been asserted or determined prior to the year 1920.

Mr. Booth:

If the Court please, I don't intend to prove the exact amount of the deficiency; the amount of the deficiency is not in question. But it is in question whether or not there were any debts or liabilities of this corporation in 1920. We propose to prove by this witness only that such debts were in existence, contingent liabilities, and were not settled until later years.

The Court:

Go ahead with that general proposition. We will overrule the objection to that.

Q. (Question read.)

A. About $550,000 for the years '16, '17 and '18.

Q. When were they finally settled?

A. December 28, 1928.

Q. Do you personally know of the final distribution by the surviving partners in 1925?

A. Yes, sir.

Q. When that distribution was made, did you or did you not advise them with respect to the unpaid income taxes and whether or not any part should be retained to meet those payments when they were demanded?

A. Yes, sir.

Mr. Eustace:

Just a moment. That is objected to, as incompetent, irrelevant and immaterial.

The Court:

Of course it is leading, but it gets us to a phase of the matter which I think could be admitted more quickly than by having him detail all his advice in connection with it. He might properly be asked what was his advice in the situation, and then detail it; and I think this gets us to it more quickly. I will overrule that objection.

Q. What was your advice to the surviving partners in the year 1925?

A. Our advice was that no distribution of any of the assets of the partnership could be made until all debts had been discharged and all possible contingent liabilities disposed of.

Mr. Eustace:

Motion is now made to strike the answer of the witness and the question.

The Court:

The motion is denied, and exception noted, for the present.

Q. Was that advice also given in 1920?

A. I think your question related to 1920, and my answer was related to the year 1920.

Q. Now, what advice did you give them in the year 1920 with respect to final distribution?

A. No final distribution could be made in the year 1920.

Q. In the year 1925, I mean.

A. In the year 1925, as the assets had been disposed of in bulk, we advised that distribution could then be made of everything except what might be necessary to take care of undisposed of Federal income and excess profits tax liabilities.

Mr. Eustace:

I move to strike the answer, as immaterial and incompetent.

The Court:

The motion is denied, and exception, for the present.

Mr. Booth:

Cross examine.

Mr. Eustace:

At this time defendant moves to strike the testimony of this witness, for the reason that it does not prove or tend to prove any issue involved in this case; the testimony is argumentative, an expression of conclusions of the witness, and incompetent, irrelevant and immaterial.

The Court:

The motion is denied and exception noted.

There was no cross examination of the witness Seifert.

Thereupon, the plaintiffs rested.

Mr. Eustace:

If the Court please, so that we may clearly understand that the record is protected, we desire to re-

quest that in all cases where the Court expressly stated that objections were overruled for the present it may be understood that exceptions are noted and allowed for all adverse rulings.

The Court:

Certainly.

Mr. Eustace:

At this time, the plaintiffs having rested their cases, the defendant moves for judgment in favor of the defendant and against the plaintiffs, upon the following grounds:

First: Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, Pennsylvania Laws 1859, P. S. 92, the partnerships of A. Overholt & Company and West Overton Distilling Company were not terminated by the death of Henry C. Frick;

Second: As a matter of law, the partnerships of A. Overholt & Company and West Overton Distilling Company continued in existence throughout the year 1920;

Third: As a matter of law, A. Overholt & Company and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918;

Fourth: Under the provisions of Section 218 of the Revenue Act of 1918, A. W. Mellon was taxable

upon his distributive share of the net income of each of the partnerships of A. Overholt & Company and West Overton Distilling Company for the year 1920. And exactly that same reason as applied to the income of R. B. Mellon;

Fifth: The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned and received by the partnership;

Sixth: There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed;

Seventh: There is no warrant in law for the plaintiffs' contention that the income of A. Overholt & Company and West Overton Distilling Company was not taxable until A. W. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919. The same reason is applied to the case filed by R. B. Mellon;

Eighth: The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Company, West Overton Distilling Company, the Estate of R. B. Mellon, A. W. Mellon and the Estate of Henry C. Frick any additional amounts of income taxes on the income for the year 1920 of A. Overholt & Company and the income for 1920 of West Overton Distilling Company;

For the further reason that the pleadings and evidence in this case, with every inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against the defendant;

For the further reason that under the law and the evidence the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiffs and against the defendant;

And for the further reason that the defendant on the pleadings and the evidence in this case is entitled to judgment dismissing plaintiffs' statements of claim at plaintiffs' costs.

This motion is made to apply to each of the cases.

The Court:

We will overrule that motion at this time, with leave to renew it at the conclusion of the case, after you have rested.

To which ruling of the Court the defendant by his counsel then and there duly excepted in each of said cases.

The opening statement of defendant was presented to the Court by his counsel. Thereupon, the defendant, to sustain the issues upon his part in each of said consolidated causes, offered the following as his evidence in chief:

Mr. Eustace:

Defendant will now read into the record from the New Matter contained in the amended affidavit of defense (A. W. Mellon case).

Beginning with the first numbered paragraph of the New Matter, defendant offers in evidence the following part of Paragraph 1, which is admitted by Paragraph 1 of the Reply:

"1. On or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. • • •" And then, appearing in the paragraph in the Reply the following sentence: "Plaintiff avers that said return constituted a return of income."

Paragraph 2:

"2. Neither Richard B. Mellon nor the plaintiff, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Company on the form prescribed for the making of returns by fiduciaries of a trust."

Paragraph 5:

"5. On or about March 15, 1921, plaintiff and his brother, Richard B. Mellon, caused to be filed

with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for said West Overton Distilling Company on official form 1065, the form prescribed by the Commissioner of Internal Revenue for the making of partnership returns of income. * * *'' And also the averment in Paragraph 5 of the Reply: ''Plaintiff avers that said return constituted a return of income.''

Mr. Booth:

If the Court please, that is admitted, except the use of the word ''partnership'' in the third line of Paragraph 5, before the words ''return of income''. The Reply in the admission omits that word, and then goes a step further and denies ''it was claimed and represented West Overton Distilling Company was a partnership''. And the same thing applies with respect to Paragraph 1.

The Court:

It may be admitted, subject to the limitation of the answer.

Mr. Eustace:

Paragraph 6, as follows:

''6. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed

for the making of returns for fiduciaries of a trust."

Paragraph 9:

"9. If the income of A. Overholt & Company for the calendar year 1920 had been treated and reported by plaintiff and his brother, Richard B. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been $551,914.70, computed as follows:

Net income as determined by the Commissioner, as set forth in Par. 19 hereof	$845,339.86
Less: Exemption	1,000.00
Income subject to normal tax	$844,339.86
Normal tax at 4% on $4,000	$ 160.00
Normal tax at 8% on $840,339.86	67,227.19
Surtax on $845,339.86	484,527.51
Total tax liability	$551,914.70."

Mr. Booth:

If the Court please, plaintiffs object to the offering in evidence of Paragraph 9 of the New Matter set forth in the affidavit of defense, on the ground that it is not admitted by the Reply in the words offered. The Reply admits that the correct tax liability on a certain amount of income, $845,339.86, would have been $551,914.70, but denies that, if a taxable trust existed, it realized such income.

The Court:

Well, it may be admitted, subject to the limitation by the answer. An exception is noted to plaintiffs.

Mr. Eustace:

Paragraph 10, as follows:

"10. If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by plaintiff and his brother, Richard B. Mellon, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, would have been $66,673.42, computed as follows:

Net income determined by the Commissioner, as set forth in Par. 19 hereof	$158,442.84
Less: Exemption	1,000.00
Income subject to normal tax	$157,442.84
Normal tax at 4% on $4,000	$ 160.00
Normal tax at 8% on $153,442.84	12,275.43
Surtax on $158,442.84	54,237.99
Total tax liability	$ 66,673.42."

Mr. Booth:

Same objection.

The Court:

It may be admitted, subject to the limitation of the answer. An exception noted to plaintiffs.

Mr. Eustace:

At this point, having reference to the computation in Paragraph 19 of the First Defense, will counsel admit the correctness of the computation as showing what the Commissioner did in arriving at the net income of the two partnerships?

It is admitted with reference to the computation in Paragraph 19 of the First Defense that the total net income of the A. Overholt & Company for the year 1920, as determined by the Commissioner, was $845,339.86, one-third of which, $281,779.95, was divided into an item $48,350.74 reported on the individual return of each of the plaintiffs as income from bottling, storage and miscellaneous of A. Overholt & Company, and increased by the Commissioner in the amount of $233,429.21 as the plaintiff's share of the income from the sale of whiskey.

Mr. Booth:

As computed by the Commissioner. That is substantially correct; we admit that, except we do not admit that the $233,000 was income; that is the income as computed by the Commissioner.

The Court:

That is, you admit it is mathematically correct?

Mr. Booth:

We admit that if it is taxable, that is the correct amount.

Mr. Eustace:

Now I would like to have the same admission with reference to the West Overton Distilling Company, the amounts being as follows:

It is admitted that the total net income of the West Overton Distilling Company for the year 1920, as determined by the Commissioner, was $158,442.84, one-third of which, $52,814.28, was divided into an item $5,960.55 reported on the individual return of each of the plaintiffs as income from bottling, storage and miscellaneous of West Overton Distilling Company, and increased by the Commissioner in the amount of $46,853.73 as the plaintiff's share of the income from the sale of whiskey.

Mr. Booth:

That is admitted, with the same qualification as stated with respect to A. Overholt & Company.

Mr. Eustace:

Returning to the Second Defense, Paragraph 11, the first part we are offering, as being admitted by the insufficiency of the denial:

> "11. The defendant, the Commissioner of Internal Revenue, and the United States relied to their prejudice on plaintiff's original position and representation in respect of the manner and method of reporting the income for the calendar year 1920 of A. Overholt & Company and the West Overton Distilling Company,"—There is no question about the admission of the next part—"and if said organizations were taxable trusts, as now

contended by plaintiff, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting the aforesaid tax liabilities for 1920 of $551,914.70 and $66,673.42 * * *."

Mr. Booth:

The latter part of that was admitted by the Reply, but the first part of Paragraph 11 was specifically denied by the Reply in the very words of the paragraph, with a contrary averment, on page 7 of the Reply.

The Court:

Of course, there is an admission that they are precluded from assessing and collecting any taxes therein alleged.

Mr. Eustace:

That admission is clear; and our construction is that the first part is admitted by inference, in the manner in which it is denied, an insufficient denial.

The Court:

I think I shall sustain the objection to that, and note an exception.

Mr. Eustace:

Then it is understood that the part in the middle of the paragraph is admitted?

The Court:

Yes; I see it is admitted as a distinct admission. You might make a declaration to that effect.

Mr. Eustace:

Defendant now offers that portion of Paragraph 11 of the Second Defense, reading as follows: "If said organizations were taxable trusts, as now contended by plaintiff, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting aforesaid tax liabilities for 1920 of $551,914.70 and $66,673.42."

And the Third Defense. Beginning on page 19, Paragraph 5 of the Third Defense:

> "5. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Company were distributed to the plaintiff, his brother Richard B. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which the aforesaid tax liability of $551,914.70 could have been collected."

Mr. Booth:

We object to the last part of that; the admission is down to the word "property."

The Court:

Well, that is the substance of it.

Mr. Eustace:

Paragraph 6 of the Third Defense:

> "6. The amount of money, together with the value of property so received by plaintiff in distribution, was equal to or in excess of the aforesaid tax liability of $551,914.70, plus interest as provided by law."

The Court:

Well, the liability part is denied, if you leave that out,—"equal to or in excess of $551,914.70," and so on, it is admitted.

Mr. Eustace:

Paragraph 7 of the Third Defense:

"7. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to the plaintiff, his brother Richard B. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which a tax liability of $66,673.42 could have been collected."

Mr. Booth:

Object to the last phrase.

The Court:

Well, it is admitted up to the words "no assets or property," which is the essential part of the admission.

Mr. Eustace:

Paragraph 8 of the Third Defense

"8. The amount of money, together with the value of property so received by plaintiff in distribution, was equal to or in excess of $66,673.42 plus interest."

Mr. Booth:

No objection.

Mr. Eustace:

In the case filed by R. B. Mellon, we desire to offer similar paragraphs, as follows:

Paragraph 1 of the Second Defense:

"1. On or about March 15, 1921, Richard B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. * * *" And the following sentence from paragraph 1 of the Reply: "Plaintiff avers that said return constituted a return of income."

Paragraph 2 of the Second Defense:

"2. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Company on the form prescribed for the making of returns by fiduciaries of a trust."

Paragraph 5 of the Second Defense:

"5. On or about March 15, 1921, Richard B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-third District of Pennsylvania a partnership return of income for the calendar year 1920 in the name of and for said West Overton Distilling Company on official form 1065, the form prescribed by the Commissioner of Internal Revenue for the making of partnership returns of income. * * *"

And in connection therewith, the averment of Paragraph 5 of the Reply: "Plaintiff avers that said return constituted a return of income."

Mr. Booth:

If the Court please, that is admitted, except the use of the word "partnership" in the third line of Paragraph 5, before the words "return of income." The Reply in the admission omits that word, and then goes a step further and denies "it was claimed and represented West Overton Distilling Company was a partnership." And the same thing is true with respect to Paragraph 1.

The Court:

It may be admitted, subject to the limitation of the answer.

Mr. Eustace:

Paragraph 6 of the Second Defense:

"6. Neither Andrew W. Mellon nor Richard B. Mellon, nor both acting jointly, filed or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the maknig of returns for fiduciaries of a trust."

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"9. If the income of A. Overholt & Company for the calendar year 1920 had been treated and reported by R. B. Mellon and his brother Andrew W. Mellon as the income of a taxable trust, the correct tax liability, exclusive of interest as pro-

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Mr. Booth:

If the Court please, plaintiffs object to the offering in evidence of Paragraph 9 of the New Matter set forth in the affidavit of defense, on the ground that it is not admitted by the Reply in the words offered. The Reply admits that the correct tax liability on a certain amount of income, $845,339.86, would have been $551,914.70, but denies that, if a taxable trust existed, it realized such income.

The Court:

Well, it may be admitted, subject to the limitation by the answer. An exception is noted to plaintiffs.

Mr. Eustace:

Paragraph 10 of the Second Defense:

"10. If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by R. B. Mellon and his

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Normal tax at 8% on $153,442.84	12,275.43
Surtax on $158,442.84	54,237.99
Total tax liability	$ 66,673.42"

Mr. Booth:

Same objection.

The Court:

It may be admitted, subject to the limitation of the answer. Exception noted to plaintiffs.

Mr. Eustace:

At this point, having reference to the computation in Paragraph 19 of the First Defense, will counsel admit the correctness of the computation as showing what the Commissioner did in arriving at the net income of the two partnerships?

It is admitted with reference to the computation in Paragraph 19 of the First Defense that the total net income of the A. Overholt & Company for the year

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As computed by the Commissioner. That is substantially correct; we admit that, except we do not admit that the $233,000 was income; that is the income as computed by the Commissioner.

The Court:

That is, you admit it is mathematically correct?

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Mr. Booth:

The latter part of that was admitted by the Reply, but the first part of Paragraph 11 was specifically denied by the Reply in the very words of the paragraph, with a contrary averment, on page 7 of the Reply.

The Court:

Of course, there is an admission that they are precluded from assessing and collecting any taxes therein alleged.

Mr. Eustace:

That admission is clear; and our construction is that the first part is admitted by inference, in the manner in which it is denied, an insufficient denial.

The Court:

I think I shall sustain the objection to that, and note an exception.

Mr. Eustace:

Then it is understood that the part in the middle of the paragraph is admitted?

The Court:

Yes; I see it is admitted as a distinct admission. You might make a declaration to that effect.

Mr. Eustace:

Defendant now offers that portion of Paragraph 11 of the Second Defense, reading as follows: "If said organizations were taxable trusts, as now contended by plaintiffs, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting aforesaid tax liabilities for 1920 of $551,914.70 and $66,673.42."

As to the Third Defense: I offer Paragraph 5 of the Third Defense, as follows:

> "5. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Company were distributed to R. B. Mellon, his brother Andrew W. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets of property out of

which the aforesaid tax liability of $551,914.70 could have been collected."

Mr. Booth:

We object to the last part of that; the admission is down to the word "property".

The Court:

Well, that is the substance of it.

Mr. Eustace:

Paragraph 6 of the Third Defense:

"6. The amount of money, together with the value of property so received by R. B. Mellon in distribution, was equal to or in excess of the aforesaid tax liability of $551,914.70, plus interest as provided by law."

The Court:

Well, the liability part is denied. If you leave that out—"equal to or in excess of $551,914.70", and so on, it is admitted.

Mr. Eustace:

Paragraph 7 of the Third Defense:

"7. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, his brother Andrew W. Mellon, and the estate of Henry C. Frick, leaving said organization with no assets or property out of which a tax liability of $66,673.42 could have been collected."

Mr. Booth:

Object to the last phrase.

The Court:

Well, it is admitted up to the words "no assets or property", which is the essential part of the admission.

Mr. Eustace:

Paragraph 8 of the Third Defense:

"8. The amount of money, together with the value of property so received by R. B. Mellon in distribution, was equal to or in excess of $66,673.42, plus interest."

Mr. Booth:

No objection.

Mr. Eustace:

At this time defendant offers in evidence Bureau letters attached to Plaintiffs' Exhibit No. 2, being letter dated February 27, 1934 to A. W. Mellon, and letter dated April 6, 1934 to A. W. Mellon.

Mr. Booth:

If the Court please, we object to the introduction of these letters as being part of our Exhibit No. 2. We object to the introduction of the letter dated February 27, 1934, as being self-serving declarations, and therefore incompetent and irrelevant. We have no objection to the letter dated April 6, 1934, which was merely a formal notice of the rejection of our refund claim.

The Court:

I will overrule the objection to that. It may be admitted as tending to show the general procedure which was observed.

Which said letters dated February 27, 1934, and April 6, 1934, to A. W. Mellon, so offered and admitted in evidence, are in words and figures as follows:

February 27, 1934.

Hon. A. W. Mellon,
Woodland Road,
Pittsburgh, Pennsylvania.

Sir:

Your claim for refund of $194,160.75, income taxes for the taxable year 1920, has been examined.

Your claim is based on the statement that amounts of $281,779.95 and $52,814.28 were included in taxable income representing operating profits of A. Overholt and Company and the West Overton Distilling Company, respectively, and that since the partnerships were in liquidation the profits were not reportable until the year 1925 when final liquidation occurred.

Careful consideration has been accorded the information submitted in the brief dated October 11, 1932 and at the conference held in Washington, D. C., October 12, 1932 and this office holds that your proportionate share of the operating profits of the above-mentioned partnerships were properly reportable on your 1930 return.

Accordingly, the claim will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932 official notice of the disallowance of the claim will be issued by registered mail.

A copy of this letter is being forwarded to your representative, Mr. William A. Seifert, in accordance with the authority conferred upon him in your power of attorney on file with the Bureau.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.

By (Signed) H. B. ROBINSON,
Head of Division.

April 6, 1934.

Hon. A. W. Mellon,
Woodland Road,
Pittsburgh, Pennsylvania.

In re: Refund claim for year 1920
Amount $194,160.75.

Sir:

Reference is made to Bureau letter dated Feb. 27, 1934 wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

You are hereby notified that the claim was disallowed on a schedule dated Apr. 6, 1934. This

notification is being mailed to you by registered mail and constitutes notice of the disallowance of the claim in accordance with the provisions of Section 3226, Revised Statutes as amended, and as further amended by Section 1103 of the Revenue Act of 1932.

By direction of the Commissioner:

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.

By (Signed) T. F. LANGLEY,
Head of Division.

Mr. Eustace:

Defendant offers in evidence instrument identified as Defendant's Exhibit "A", being individual income tax return of A. W. Mellon for the year 1920, certified copy.

Mr. Booth:

If the Court please, we admit that this is a correct return, but all the evidence that is necessary to be taken from this return has been admitted by the pleadings; it contains a lot of schedules that are entirely immaterial and irrelevant to the issue in this case. The pleadings admit that Mr. Mellon in his individual return picked up a reported profit shown by the so-called partnership return and paid the tax on it, and the evidence so far admits that the Commissioner increased that figure and collected an additional tax; and this

report serves no just purpose in arriving at the issue in this case.

The Court:

The objection is overruled; an exception.

That the full purport and substance of said exhibit so offered and admitted in evidence is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "A".

(Pages 404 a, 404 b, 404 c.)

[redacted]

DUAL INCOME TAX RETURN

PERIOD OTHER
A CALENDAR
THE RETURN
E FILED ON OR
THE 15TH DAY
THIRD MONTH
NG THE CLOSE
UCH PERIOD

Or for period

A W Mellon
Woodland Rd
Pittsburgh Pa

PENNSYLVANIA
Collector's district

Mar. 15 1921

(or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true
e return made in good faith for the taxable period as stated, pursuant to the Revenue Act of 1918 and the Regulations issued under authority thereof.

y Commission Expires
February 21, 1922

(If return is made by agent, the return (Signature of agent.)
(Title.)

(Address of principal or agent.)

[redacted]

(Seal)

file a ... 6. How, when and to whom
r 1919? Yes did you give on that return? Same as above

(Give district or city and State)
Pittsburgh Pa

receive any compensation during this taxable period on account of
ment contracts (other than the operations of a claims board or otherwise)? None

were you on the last day of your taxable period
ing one or more persons listed in your household
closely related to you by blood, marriage, or adoption? Yes

If so, state (a)
(b) Number of such persons for whom
exemption claimed $ ... at head of this column

(Signature.)

(Address.)

4. If neither, of what country
are you a citizen or subject?

5. In what Collector's office was it case?

6. Were you married and living with wife
(or husband) on the last day of your taxable period? Single

7. How many dependent persons under 18 (or if 18 or over, incapable of
self-support because mentally or physically defective) were receiv-
ing their chief support from you on the last day of your taxable period? One

"B" If you kept no books, or keep them on a cash
"A" If you kept books on an accrual basis R

11. Did you pay during the taxable year (other than taxes withheld at source, wages, salaries, or other items deductible from the Collector's Form) [illegible] a person, or partnership,

ollow all nontaxable income received by you during the taxable period from the following sources:

Kind of Securities.	Par Value.	Interest.	Name of Obligor.	Purchase Price.	Par Value.	Amount.
Less 85% Bonds exempt from tax under the provisions of the U.S. Revenue Act before Sept. 1, 1917, or bonds of U. S. possessions			Obligations of States and Territories and political subdivisions thereof, and the District of Columbia	35464	12168	
Less 85% Notes	750	9843.75	Federal Farm Loan Bonds	2025	91750	

n the table below income (whether received or not) from partnerships, personal service corporations, and fiduciaries.

Name and Address of Partnership, Personal Service Corporation, or Estate or Trust, with Name and Address of Fiduciary.	Year.	Amount.	Deductions.	Net Income.	Amount.
[redacted]					
Arnold & Co., Pittsburgh, Pa	1920				
Overton Distilling Co., West Overton, Pa	1920				
W. B. Mellon Trustee, Pittsburgh, Pa	1920				

[redacted]

	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918	Interest Received from Liberty Bonds and Treasury Certificates of Indebtedness, Series of 1917 and 1918
	Dec. 15, 1917	May 15, 1918	June 15, 1918							
	June 15, Dec. 15,	May 15, Nov. 15,	June 15, Dec. 15,							
of interest	$									
principal										
ions.										
	1 A - Exempt	1 Fiduciary	1%							

[redacted]

ATTACH RETURN HERE AND

rable interest on all obligations as stated above on line (1) (same as Item 19 below, and as Schedule L, page 2) ____

mount of the Victory Liberty Loan 4½% and 4¼% Notes originally subscribed for and still owned at the date of filing this return ____

mount of the Fourth Liberty Loan 4¼% Bonds originally subscribed for and still owned at the date of filing this return ____

COMPUTATION OF TAX.

come on which tax is to be computed (from Schedule F)		$ 15206 16
Dividends (from Schedule H)	$ 5829 22	
Taxable interest on Liberty Bonds, etc. (from Item 16 (f) above)	4347 18	
Personal exemption	2200	
TOTAL OF ITEMS 18, 19, AND 20		5360 35
e subject to normal tax (Item 17 minus Item 21)		None
t subject to normal tax at 4% (not over $4,000)		None
e subject to normal tax at 8% (Item 22 minus Item 23)		None

PREPARATION OF RETURN.

ou employ anyone especially to prepare or advise in the preparation of this
nswer "Yes" or "No.") _____ If so, give name and address and
xtent to which you received such assistance or advice. _____

Check of $ _____ enclosed herewith in payment of tax. Pay at your Collector's office.

...

...

...

2132 94
2027 70

...from underwriting ... $212272 29

Total ...

SCHEDULE H.—DIVIDENDS.

...received (a) directly, $...; (b) through partnerships, personal service corporations, and fiduciaries (Item 15 (a), column 4), $ None TOTAL $ 3353819 22

...TAXABLE INTEREST ON LIBERTY BONDS, OTHER OBLIGATIONS OF THE UNITED STATES, AND WAR FINANCE CORPORATION BONDS (from Item 16 (l), page 1) $ 43147 45

SCHEDULE J.—TOTAL NET INCOME FROM ABOVE SOURCES (Total net income less total deficits shown in above Schedules) 2370499 91

SCHEDULE K.—DEDUCTIONS (except those included above and contributions).

...paid ... $ 4. Bad debts (explain in space at foot below) ... 5. Amounts paid to beneficiaries, etc. $ Office expense 36160.20 TOTAL ... 610142 99

...(Subtract contributions) (J minus K) ... 1759956 92

...(Dividends received, if any, paid to such corporation) ... 239341 01

...TAX IS TO BE COMPUTED (L minus M) (Enter as Item 17, page 1) ... 1620616 91

SCHEDULE L.—DEPRECIATION, PROPERTY LOSSES, ETC., CLAIMED AS DEDUCTIONS IN SCHEDULES A, E, AND K ABOVE.

Item No.	Kind of Property	Date Acquired	Cost or Other Basis as of March 1, 1913	4. Additions, Other than Amounts Entered in Column 3	5. Rate.	Wear and Tear, Obsolescence, and Depletion Charged Off. 6. Amount past years.	7. Amount this year.	10. Losses not Compensated for by Insurance or Otherwise (Cause and How Amount was Arrived at).

...Schedule B, column 5; Schedule E, column 7; Schedule K, Item 4; and Schedule M. (Attach supplemental sheet if necessary.)

...ge is salaries, rent supplies, etc.

...ing, extinguishing fire in coal, demolishing building, etc

[redacted]

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

I swear (or affirm) that this retur
and complete return made in good fai
My Commission E
February 21, 19

[redacted]

United States
Did you file a return for 1919? Yes
Did you receive any compensation Government contracts through th
If not, were you on the last day supporting one or more persons
who are closely related to you by
11. Was a separate return filed by your wife (or husband)?
12. Write "R" if you kept no books, basis or "A" if you kept books on
14. Enter below all nontaxable inco

Kind of Securities.	
First Liberty Loan 3½% Bonds converted	
Other obligations of the U.S. issued before Sept. 1, 1917, and obligations of U. S. possessions	
Liberty Loan 3½% Bonds	

15. Enter in the table below income (

1. Name and Address of Partnership, Trust, with N	
[redacted]	
Overhold & Co
Westoverton Distil
W. AV. RR. Mellon	
[redacted]	
Explanation	First Liberty Loan Conversion 4% Bonds of 1932-47.
Interest Dates	June 15. December 15.
(a) Amount of interest	$
(b) Average principal	
Exemptions.	
(c) $5,000	
(d) 20,000	
(e) 30,000	
(f) 45,000	
(g) 50,000	x x x x x x
(h) 30,000	x x x x x x
(i) 5,000	x x x x x x

(f) 45,000	
(g) 20,000	x x x x x x
(h) 20,000	x x x x x x
(i) 5,000	x x x x x x
(j) Principal in excess of exemptions	
(k) Taxable interest	

(l) Total taxable interest on all obli

State the amount of the Victory Lib

State the amount of the Fourth Libe

17. Net income on which tax is to b

18. Less: Dividends (from Schedule

19. Taxable interest on Liber (from Item 16 (k) above)

20. Personal exemption

21. TOTAL OF ITEMS 18, 19, A

22. Balance subject to normal tax (I

23. Amount subject to normal tax a

24. Balance subject to normal tax at

PREPARA

Did you employ anyone especi

person? (Answer "Yes" or "No.")

state the extent to which you receiv

FROM

See sc

INCOME FROM PARTN

PROFIT FROM SALE O

1. Kind of Property.	2. Na
	See sc

Net Profit from Sales (total of

SCHEDULE E.—INCOME F

1. Kind of Property.	2. Name

See s

and 7)

Received (a) directly, $

SCHEDULE G.—OTHER IN

Interest on bonds, mortgages, and
Interest on bonds of foreign count
Income on their net incomes

Interest on bank deposits, mortga

Interest paid for you at source on

from underwri

TOTAL



Mr. Eustace:

Defendant offers in evidence a certified copy of the individual income tax return of Richard B. Mellon for the year 1920, identified as Defendant's Exhibit "B".

Mr. Booth:

Same objection.

The Court:

Objection overruled; exception noted.

That the full purport and substance of said exhibit so offered and admitted in evidence is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "B".

(Page 406 a.)

...AR YEAR 1920
...T WITH THE
...R OF INTERNAL
...E FOR YOUR
...ON OR BEFORE
...CH 15, 1921

...PERIOD OTHER
...A CALENDAR
...THE RETURN
...E FILED ON OR
...THE 15TH DAY
...THIRD MONTH
...NG THE CLOSE
...CH PERIOD

Page 1 of Return

Form 1040—UNITED STATES INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000, OR SEPARATE RETURNS OF HUSBAND AND WIFE IF COMBINED NET INCOME EXCEEDS $5,000

FOR CALENDAR YEAR 1920

(DO NOT WRITE IN THIS SPACE)

Examined by

Audited by

FIRST PAYMENT $

Cashier's Stamp

If the return is made for a period other than a calendar year, the dates of the beginning and ending of the period covered must be plainly stated in the space provided above.

For the period begun JAN. 1ST., 1920, and ended DEC. 31ST., 1920.

PRINT PLAINLY NAME, STREET AND NUMBER, OR RURAL ROUTE, POST OFFICE, COUNTY, AND STATE

Richard B. Mellon,
6500 Fifth Avenue,
Pittsburgh, Pa.

304030

CASH | CHECK | M. O. | CERT. of IND.

...(or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true ...e return made in good faith, for the taxable period as stated, pursuant to the Revenue Act of 1918 and the Regulations issued under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line.)

...o and subscribed before me this 14th day of March, 1921.

(Signature of officer administering oath.) (Title.)

Richard B. Mellon
(Signature of individual or agent.)

6500 Fifth Avenue, Pgh., Pa.
(Address of individual or agent.)

...a citizen of ...ed States? YES

...file a ...or 1919? YES

...receive any adjustments during the taxable period on account of ...ment contracts through the operations of a claims board or otherwise? NO.

...were you on the last day of your taxable period ...ing one or more persons living in your household ...closely related to you by blood, marriage, or adoption? *******

...eparate return filed ...wife (or husband)? YES. If so, state (a) exemption claimed $ NONE.

...R" if you kept no books, or books on a cash R ..."A" if you kept books on an accrual basis.

2. If not, are you a resident of the United States? *****

5. If so, what address did you give on that return? SAME AS ABOVE.

3. If neither, of what country are you a citizen or subject? *****

6. To what Collector's office was it sent? (Give district or city and State) PITTSBURGH, PA.

8. Were you married and living with wife (or husband) on the last day of your taxable period? YES

10. How many dependent persons under 18 (or if 18 or over, incapable of self support because mentally or physically defective) were receiving their chief support from you on the last day of your taxable period? NONE

(b) Name and address entered at head of that return JENNIE K.MELLON, 6500-5TH AVE.PGH.PA.

13. Did you pay during the calendar year 1920 to any individual rent, wages, salaries, or other fixed or determinable income amounting to $1,000 or over? YES (If so, secure from the Collector Forms 1096 and 1099 and file a return of information.)

...below all nontaxable income received by you during the taxable period from the following sources:

...E OF SECURITIES.	PRINCIPAL.	INTEREST.	CLASS OF SECURITIES.	PRINCIPAL.	INTEREST.	SOURCE OF COMPENSATION.	AMOUNT.
...an 3½% Bonds unconverted	$	$	Obligations of States and Territories, political subdivisions thereof, and the District of Columbia	$	$		$
...s of the U.S. issued before Sept. ...bligations of U. S. possessions							
...Loan 3½% Notes	137,000.	5252.20	Federal Farm Loan Bonds				

...the table below income (whether received or not) from partnerships, personal service corporations, and fiduciaries.

...ND ADDRESS OF PARTNERSHIP, PERSONAL SERVICE CORPORATION, OR TITLE OF ESTATE OR TRUST, WITH NAME AND ADDRESS OF FIDUCIARY.	2. PERIOD (ENTER 1920 OR DATE ON WHICH FISCAL YEAR ENDED).	3. INTEREST ON TAX-FREE COVENANT BONDS.	4. DIVIDENDS.	5. INTEREST ON LIBERTY BONDS, ETC., ISSUED SINCE SEPT. 1, 1917, AND WAR FINANCE CORPORATION BONDS.	6. OTHER INCOME.
...holt & Co., Frick Bldg., Pgh., Pa.	1920	$	$	$	$ 48350.74
...verton Distilling Co., Scottdale, Pa.	1920				5960.55
...W.& R.B.Mellon,Trustees, 514 Smithfield St., Pittsburgh, Pa.	1920				39050.63
...ee page 2 of instructions, Schedule C)		Enter as F (b), page 2.	Enter as E (b), page 2.	Include in 10 (a), page 1.	Enter as C, page 2. $ 93361.92

...line (a) in the table below Interest on Liberty Bonds and other obligations of the United States issued since September 1, 1917, and War Finance Corporation Bonds, received ...during the taxable period, including interest received through partnerships, personal service corporations, and fiduciaries. (See page 2 of instructions, Schedule I.)

	FIRST LIBERTY LOAN CONVERTED 4% BONDS OF 1932-47,	SECOND LIBERTY LOAN 4% BONDS OF 1927-42.	FIRST LIBERTY LOAN CONVERTED 4½% BONDS OF 1932-42.	SECOND LIBERTY LOAN CONVERTED 4½% BONDS OF 1927-42.	THIRD LIBERTY LOAN 4½% BONDS OF 1928.	FIRST LIBERTY LOAN SECOND CONVERTED 4½% BONDS OF 1932-47.	FOURTH LIBERTY LOAN 4½% BONDS OF 1933-38.	...% OTHER OBLIGATIONS ISSUED SINCE SEPT. 1, 1917.	VICTORY LIBERTY LOAN 4½% NOTES OF 1922-23.	WAR FINANCE CORPORATION 5% BONDS OF 1920.
...	June 15. December 15.	May 15. November 15.	June 15. December 15.	May 15. November 15.	March 15. September 15.	June 15. December 15.	April 15. October 15.		June 15. December 15.	April 1. October 1.
...Interest				$ 1122.57	$ 2628.88		$ 2652.40		$ 1.16	
...rincipal				26413.40	61856.00		62410.00		25.00	

...IT TO COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT.

of interest		$ 1122.57	$ 2628.88	$	$ 2652.40	$	$ 1.16	$
principal		26413.40	61856.00		62410.00		25.00	
ptions.								
	176259.70	5000.00	--		--		xxxxxx	xxxxxx
						xxxxxx	xxxxxx	xxxxxx
	12527.49	21413.40	8576.60		--	xxxxxx	xxxxxx	xxxxxx
				xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx
	18778.77	xxxxxx	xxxxxx		xxxxxx	xxxxxx	xxxxxx	xxxxxx
		xxxxxx	xxxxxx	xxxxxx	30000.00	xxxxxx	xxxxxx	xxxxxx
	29.22	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	
l in excess emptions.		NONE	53279.40		32410.00		25.00	
le interest.			2864.37		1377.43		1.16	

Taxable interest on all obligations as computed above on line (*l*) (enter as Item 19 below, and as Schedule I, page 2) $3642.96

amount of the Victory Liberty Loan 3½% and 4¼% Notes originally subscribed for and still owned at the date of filing this return $ NONE

amount of the Fourth Liberty Loan 4¼% Bonds originally subscribed for and still owned at the date of filing this return $ NONE

COMPUTATION OF TAX.

come on which tax is to be computed (from Schedule N)		$ 726727	76
Dividends (from Schedule H)	$995142 83		
Taxable interest on Liberty Bonds, etc. (from Item 16 (*l*) above)	3642 96		
Personal exemption	NONE		
TOTAL OF ITEMS 18, 19, AND 20		998785	79
ne subject to normal tax (Item 17 minus Item 21)		$ NONE	
nt subject to normal tax at 4% (not over $4,000)			
ne subject to normal tax at 8% (Item 22 minus Item 23)		$ NONE	

25. Normal tax at 4% on amount of Item 23			$ NONE	
26. Normal tax at 8% on amount of Item 24			NONE	
27. Surtax on Item 17 (see surtax table, page 1 of instructions)			408615	77
28. TOTAL TAX			$ 408615	77
29. Less: Tax paid at source	$ 1942	49		
30. Income and profits taxes paid during taxable period to foreign countries or possessions of the United States (attach Form 1116)	--	--	1942	49
31. Balance of tax due (Item 28 minus Items 29 and 30)			406673	28
32. Amount of tax paid on submission of return one-fourth			$ 101668	82

PREPARATION OF RETURN.

you employ anyone especially to prepare or advise in the preparation of this (Answer "Yes" or "No.") No. If so, give name and address and extent to which you received such assistance or advice

AMENDED RETURNS.

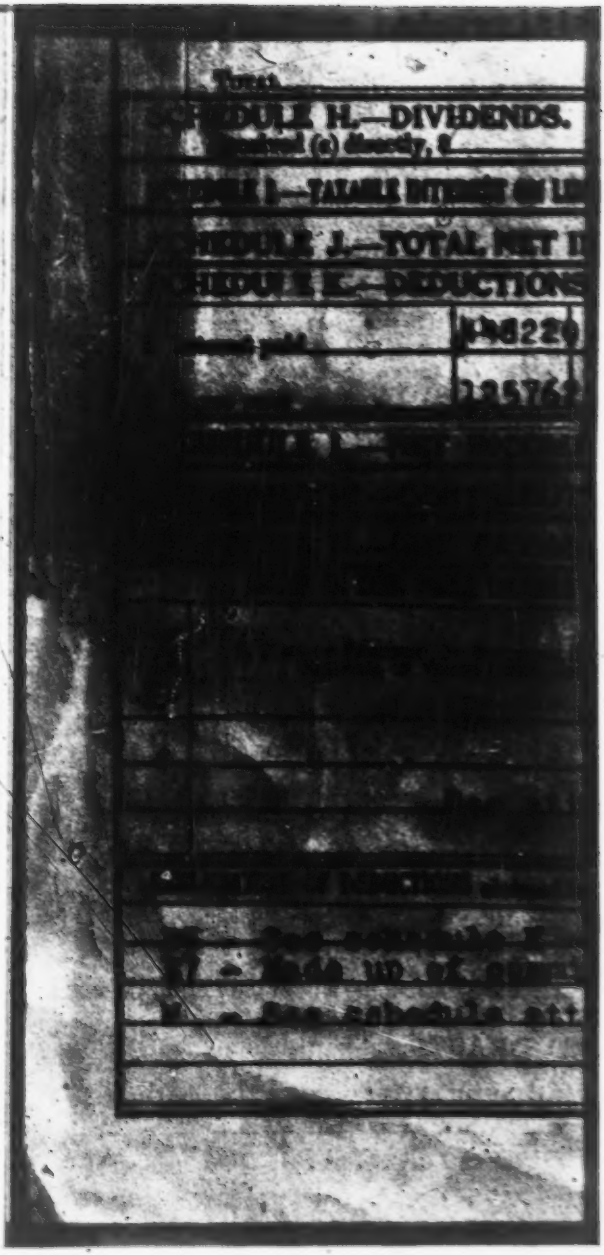
An amended return must be plainly marked "Amended" across the face of the return.

CHECKS AND DRAFTS.

Checks and drafts will be accepted only if payable at par at your Collector's office.

DETACH RETURN HERE AND SEND IT

84



2 of Return

INDIVIDUAL RETURN OF TAXABLE INCOME

SCHEDULE A.—INCOME FROM BUSINESS OR PROFESSION.

Kind of business _____ 2. Business address _____

Total sales and income from business or professional services _____ $ _____

COST OF GOODS SOLD:

Labor	$	
Material and supplies		
Merchandise bought for sale		
Other costs (list principal items and amounts at foot of page or on separate sheet)		
Plus inventory at beginning of year (see page 2 of instructions, Schedule A)		
TOTAL	$	
Less inventory at end of year		
NET COST OF GOODS SOLD	$	

State amount of salary to self included in Item 12 $ _____

State amount of obsolescence included in Item 16 $ _____

OTHER BUSINESS DEDUCTIONS:

12. Salaries and wages not reported as "Labor" under "Cost of goods sold"	$	
13. Rent on business property in which taxpayer has no equity		
14. Interest on business indebtedness to others		
15. Taxes on business and business property		
16. Repairs, wear and tear, obsolescence, depletion, and property losses (explain in table below)		
17. Amortization of war facilities		
18. Bad debts arising from sales or professional services		
19. Other expenses (list principal items and amounts at foot of page or on separate sheet)		
20. TOTAL (Items 12 to 19, inclusive)	$	
21. NET COST, PLUS TOTAL DEDUCTIONS (Item 11 plus Item 20)	$	
22. NET INCOME FROM BUSINESS OR PROFESSION (Item 3 minus Item 21)	$	NONE

SCHEDULE B.—INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTOR'S FEES, AND PENSIONS.

1. BY WHOM RECEIVED. (Give name.)	2. OCCUPATION.	3. NAME AND ADDRESS OF EMPLOYER.	4. AMOUNT RECEIVED.	5. EXPENSES (EXPLAIN BELOW).	
SEE SCHEDULE ATTACHED.			$	$	9624 96

NET INCOME FROM SALARIES, ETC. (total of column 4 minus total of column 5) $ _____ $ _____

SCHEDULE C.—INCOME FROM PARTNERSHIPS, PERSONAL SERVICE CORPORATIONS, AND FIDUCIARIES (From Item 15 (a) column 6, page 1) $ 93361 92

SCHEDULE D.—PROFIT FROM SALE OF LAND, BUILDINGS, STOCKS, BONDS AND OTHER PROPERTY, AND FROM LIQUIDATING DIVIDENDS.

KIND OF PROPERTY.	2. NAME AND ADDRESS OF PURCHASER OR BROKER.	3. SALE PRICE OR LIQUIDATING DIVIDENDS.	4. DATE ACQUIRED	5. COST, OR IF ACQUIRED PRIOR TO MARCH 1, 1913, THE FAIR MARKET VALUE ON THAT DATE.	6. COST OF SUBSEQUENT IMPROVEMENTS, IF ANY.	7. DEPRECIATION.	
SEE SCHEDULE ATTACHED.		$		$	$	$	LOSS 164459 39

NET PROFIT FROM SALES (total of columns 3 and 7 minus total of columns 5 and 6) $ _____ $ _____ $ _____ $ _____

SCHEDULE E.—INCOME FROM RENTS AND ROYALTIES.

KIND OF PROPERTY.	2. NAME AND ADDRESS OF TENANT, LESSEE, ETC.	3. AMOUNT RECEIVED.	4. REPAIRS, WEAR AND TEAR, OBSOLESCENCE, DEPLETION AND PROPERTY LOSSES.	5. INTEREST.	6. TAXES.	7. OTHER EXPENSES (EXPLAIN BELOW).	
SEE SCHEDULE ATTACHED.		92663 47	9877 --	5475 --	98477 31	29969 60	LOSS 51135 44

NET INCOME FROM RENTS AND ROYALTIES (total of column 3 minus total of columns 4, 5, 6, and 7) $ _____ $ _____ $ _____ $ _____ $ _____

SCHEDULE F.—INTEREST ON CORPORATION BONDS CONTAINING TAX-FREE COVENANT, ON WHICH A TAX OF 2% WAS PAID AT SOURCE.
Received (a) directly, $ _____; (b) through partnerships, personal service corporations, and fiduciaries (Item 15 (a), column 3), $ _____ TOTAL $ 97124 50

SCHEDULE G.—OTHER INCOME (not including dividends, or interest on obligations of the United States).

	AMOUNT RECEIVED.	
Interest on bonds, mortgages, and other obligations of domestic and resident corporations except as reported in Schedule F	$ 375 00	
Interest on bonds of foreign countries and corporations, and dividends on stock of foreign corporations which are not taxable by the United States on their net incomes	6273 38	
Interest on bank deposits, mortgages, etc	196785 45	
Amount paid for you at source on tax-free covenant bonds	1942 49	
TOTAL		205376 32

SCHEDULE H.—DIVIDENDS.

Received (a) directly, $ ALL; (b) through partnerships, personal service corporations, and fiduciaries (Item 15 (a), column 4), $ _____ TOTAL 995142 83

SCHEDULE I.—TAXABLE INTEREST ON LIBERTY BONDS, OTHER OBLIGATIONS OF THE UNITED STATES, AND WAR FINANCE CORPORATION BONDS (from Item 15 (f), page 1) $ 3642 96

SCHEDULE J.—TOTAL NET INCOME FROM ABOVE SOURCES (Total net income less total deficits shown in above Schedules) 1188678 66

SCHEDULE K.—DEDUCTIONS (except those included above and contributions).

Interest paid	$ 16326 10	3. Losses by fire, storm, etc. (explain in table below)	$	5. Business Expense	$ 29052 19
Taxes paid	86201 52	4. Bad debts (explain in space at foot of page)	2135 00	6. Amounts paid to beneficiaries, etc.	
				TOTAL	333704 82

SCHEDULE L.—NET INCOME (without deducting contributions) (J minus K) 854973 84

SCHEDULE M.—CONTRIBUTIONS (List below names and amounts paid to each corporation) SEE SCHEDULE ATTACHED 128246 08

SCHEDULE N.—NET INCOME UPON WHICH TAX IS TO BE COMPUTED (L minus M) (Enter as Item 17, page 1) 726727 76

ENTER IN THIS TABLE DETAILS CONCERNING REPAIRS, WEAR AND TEAR, PROPERTY LOSSES, ETC., CLAIMED AS DEDUCTIONS IN SCHEDULES A, E, AND K ABOVE.

2. KIND OF PROPERTY (IF BUILDINGS, STATE AND MATERIAL OF WHICH CONSTRUCTED).	3. DATE ACQUIRED.	4. AGE WHEN ACQUIRED.	5. COST, OR IF ACQUIRED PRIOR TO MARCH 1, 1913, THE FAIR MARKET VALUE ON THAT DATE.	6. REPAIRS, ORDINARY AND INCIDENTAL.	WEAR AND TEAR, OBSOLESCENCE, AND DEPLETION CHARGED OFF. 7. Rate.	8. Amount previous years.	9. Amount this year.	10. LOSSES NOT COMPENSATED FOR BY INSURANCE OR OTHERWISE. CAUSE AND HOW AMOUNT WAS ARRIVED AT.
			$	$		$	$	

EXPLANATION OF DEDUCTIONS claimed in Schedule A, Items 7 and 19; Schedule B, column 5; Schedule E, column 7; Schedule K, Item 4; and Schedule M. (Attach separate sheet if necessary.)

ITEM 7-SCHEDULE "E" - WATER RENTS, TAXES, ETC. PAID BY TENANTS, ALSO COMMISSIONS PAID AND LOSSES DUE TO TEARING DOWN BUILDINGS.

ITEM 4 - SCHEDULE "K" - LOANS NOT COLLECTIBLE.

SCHEDULE "F" - INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTORS FEES, ETC.

Received by	Occupation	Employer & Address		Amount Received.
Richard B.Mellon,	Director,	Union Tr. Co.,	Pittsburgh, Pa.	$ 800.00
Do.	Director,	Gulf Oil Corp.	Do.	100.00
Do.	Director,	Union Savings Bank,	Do.	200.00
Do.	Director,	Mellon Natl. Bank,	Do.	200.00
Do.	Managing Partner	A. Overholt & Co.	Do.	2,499.96
Do.	Director,	Aluminum Co. of Amer.	Do.	5,000.00
Do.	Director	Federal Reserve Bank,	Do.	70.00
Do.	Director,	Penna. Wtr. Co.	Wilkinsburg, Pa.	5.00
Do.	Treasurer	Ligonier Valley RR.Co.,	Ligonier, Pa.	1,050.00
				$ 9,824.96

The omitted portions of said Defendant's Exhibits "A" and "B", together with the parts set forth above, are also incorporated by reference and made parts hereof, the original said exhibits in certified photostatic form having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibits be sent up in their original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

Mr. Eustace:

Defendant offers in evidence, as Defendant's Exhibit "C", certified photostatic copy of a letter dated February 9, 1922, to the Commissioner of Internal Revenue from Albert W. Smith, acting revenue agent in charge, Pittsburgh, Pennsylvania, transmitting revenue agent's report dated November 8, 1921, submitted to Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, by Albert W. Smith, internal revenue agent, *in re* A. W. Mellon, Pittsburgh, Pennsylvania.

Mr. Booth:

If the Court, please, I would like an offer on this revenue agent's report.

The Court:

What is the purpose?

Mr. Eustace:

The purpose of this is to show what the Commissioner did in reaching his determination of the de-

IF RET... IS FOR CALENDAR YEAR 1920 FILE IT WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1921

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

I swear (or affirm) that this r
and complete return made in goo

Sworn to and subscribed befo

(Signature of officer ad

1. Are you a citizen of the United States? YES
4. Did you file a return for 1919? YES
7. Did you receive any adjustm Government contracts through
9. If not, were you on the last supporting one or more person who are closely related to you
11. Was a separate return filed by your wife (or husband)?
12. Write "R" if you kept no boo basis; or "A" if you kept boo
14. Enter below all nontaxable

CLASS OF SECURITIES.
First Liberty Loan 3½% Bonds and converte
Other obligations of the U.S. issued before S 1, 1917, and obligations of U. S. possessio
Victory Liberty Loan 3¾% Notes

15. Enter in the table below incom

1. NAME AND ADDRESS OF PARTNER TRUST, WH

File

A. Overholt & Co.
West Overton Dist
J.P.-A.W.& R.B.Mc
St.

(a) Totals (see page 2 of instructi
16. Enter on line (a) in the table by you during the taxable

OBLIGATIONS	FIRST LIBE LOAN CONVE 4% BONDS 1932-47
INTEREST DATES	June 15, December
(a) Amount of interest	[illegible] 27
(b) Average principal	
Exemptions.	
(c) $5,000	
(d) 20,000	
(e) 30,000	
(f) 45,000	
(g) 30,000	X X X X X
(h) 30,000	X X X X X
(i) 5,000	X X X X X
(j) Principal in excess of exemptions	
(k) Taxable interest	

(l) Total taxable interest on all ob

State the amount of the Victory L

State the amount of the Fourth L

17. Net income on which tax is to
18. Less: Dividends (from Schedu
19. Taxable interest on Lib (from Item 16 (l) abov
20. Personal exemption
21. TOTAL OF ITEMS 18, 19,
22. Balance subject to normal tax
23. Amount subject to normal tax
24. Balance subject to normal tax

PREPA

Did you employ anyone exp
return? (Answer "Yes" or "No
state the extent to which you re

SCHEDUL

1. Kind of bu

3. Total sales

COST OF GO

4. Labor .....

5. Material an

6. Merchandis

7. Other costs
foot of pa

8. Plus invent
of instruc

9. Tot

10. Less invent

11. Net Cost o

State am
Item 12
State am
Item 16

SCHEDULE

1.

Net Incom

SCHEDULE C.—

SCHEDULE D.—

1. Kind of Prop

SE

Net Prop

SCHEDULE

1. Kind of Prop

SE

Net Incom
of colum

SCHEDULE F.—
Received

SCHEDULE

1. Interest on
2. Interest on
States on

3. Interest on

4. Amount paid

5. _____

Total.

SCHEDULE
Received

SCHEDULE I.—

SCHEDULE

SCHEDULE

1. Interest paid

2. Taxes paid

SCHEDULE

SCHEDULE

SCHEDULE

ENTE

1. Refer to "A," "E," or "K"	2. Kin

EXPLANATION

ITEM 7—S

ITEM 4

ficiency, based upon the information contained in letters which we will later offer from the Commissioner to the taxpayer; to be connected up by other exhibits.

Mr. Booth:

If the Court please, this is objected to on the record, that the report of the revenue agent is hearsay; that the action of the Commissioner is shown by his sixty-day letter; and this report besides being hearsay is irrelevant and generally immaterial, it contains a lot of matters which are entirely outside the scope of this case.

Mr. Eustace:

I might say further in connection with this offer that the deficiency letter which was sent to the taxpayer, plaintiff by the Commissioner of Internal Revenue was made up from his report, and refers to the report, the letter later to be offered in evidence.

Mr. Booth:

If the Court please, this report, or any report of a revenue agent, is purely hearsay testimony. The revenue agent has not been called to identify it; we do not know where he gets his figures; and the report covers the entire income of the plaintiff, irrespective of whether the other items are involved in this suit; this report is not the determination of the Commissioner, and the only determination of the Commissioner is set forth in his sixty-day letter; the report is entirely hearsay evidence, and is not competent.

The Court:

Is it attached in any way to the Commissioner's findings?

Mr. Eustace:

It is referred to in the Commissioner's letter which will later be introduced in evidence, and figures in that letter were taken from this report, as will be shown by the deficiency letter itself.

The Court:

What does it tend to prove?

Mr. Eustace:

It shows what the Commissioner did in determining the deficiency, and the correctness of the tax. It refutes the allegations of the statement of claim, which have been denied in the affidavit of defense, going to the question of whether or not these were partnerships and as to whether or not the plaintiff has now changed front.

The Court:

But how would that show any change of front, a letter by the agent? It would not be an action of the plaintiff at all.

Mr. Eustace:

It connects up with the action of the Commissioner; it is offered for the purpose of showing what the Commissioner did; it connects up with the protest filed by the plaintiff to the action of the Commissioner.

Mr. Frazer:

This doesn't show what the Commissioner did, if the Court please. We have no objection to his putting in the final report of the Commissioner, but this is purely hearsay.

The Court:

It would not, of course, prove the facts alleged in it at all; it could not be used for that purpose in any way whatsoever. I cannot see what effect it would have in the case. It seems to me now it must be excluded.

Mr. Eustace:

Note an exception.

The Court:

Yes.

Mr. Eustace:

At this time defendant offers certified copy of the letter dated February 9, 1922, to the Commissioner of Internal Revenue, from Albert W. Smith, acting revenue agent in charge, Pittsburgh, Pennsylvania, transmitting revenue agent's report dated November 8, 1921, with Exhibit "A" attached, submitted to the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, by Albert W. Smith, internal revenue agent in charge, *re* R. B. Mellon, Pittsburgh. This is offered as Defendant's Exhibit "D".

Mr. Booth:

Same objection; it is exactly a similar report to the other one, covering the individual income tax return of individual R. B. Mellon.

The Court:

The objection is sustained, and exception noted.

(Defendant's Exhibits "C" and "D" were subsequently admitted as hereinafter shown.)

Mr. Eustace:

At this time the defendant offers in evidence certified photostatic copy of a letter dated February 21, 1927, with statement attached, to Mr. A. W. Mellon, Pittsburgh, Pennsylvania, from D. H. Blair, Commissioner, being deficiency letter relating to the 1920 income of plaintiff. This is offered as Defendant's Exhibit "E".

Mr. Booth:

If the Court please, this sixty-day letter shows nothing that adds to this case, and it is objected to on the ground that it is redundant, and therefore immaterial. The pleadings and the evidence so far show what the Commissioner did with respect to the 1920 tax of the plaintiff A. W. Mellon.

The Court:

I will overrule the objection, and note an exception. It may be admitted.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "E".

February 21, 1927.

Mr. A. W. Mellon,
Woodland Road,
Pittsburgh, Pa.

Sir:

The determination of your income tax liability for the years 1919 and 1920, pursuant to an exam-

ination of your books of account and records, as set forth in office letter dated December 16, 1926, has been changed as a result of your protest to disclose a deficiency in tax amounting to $384,580.45. The adjustments are shown in detail in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requsted to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commis-

sioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-WSL. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882

STATEMENT

February 21, 1927

A. W. Mellon
Pittsburgh, Pa.

	Deficiency	
1919	$194,160.75	Waiver expires December 31, 1927
1920	190,419.70	Waiver expires December 31, 1927
	384,580.45	

The above deficiency in tax for 1919 and 1920 is the result of an audit of your returns for the respective years in connection with the report of the

Internal Revenue Agent at Pittsburgh, Pennsylvania, dated November 8, 1921, and a conference held in this office on February 19, 1927, with your representative.

In the protests of January 29 and February 11, 1927, filed in your behalf, exception is taken to the disallowance of deductions claimed in your returns for contributions to the Citizen's Committee on the City Plan of Pittsburgh. In view of a recent ruling of the Bureau, a copy of which is attached to the protest of February 11, 1927, these deductions have been allowed.

In the protest of January 29, 1927, exception is also taken to the refusal of this office to allow as a deduction for the years involved, your aliquot part of an alleged value of $1,364,330.20 as of March 1, 1913, for the goodwill, trade marks, trade names, etc. of A. Overholt & Company. This item, however, is not mentioned in the subsequent protest of February 11, 1927. In this connection you are advised that no deduction for obsolescence is allowable under a recent decision of the U. S. District Court in the case of the Red Wing Malting Company.

For 1919 your net taxable income as shown in office letter of December 16, 1926, has been reduced by $1,350.00, representing contributions to the Citizen's Committee previously disallowed, resulting in a corrected net income of $2,998,417.73 and corrected tax liability of $1,877,670.43. Inasmuch as 1,683,509.68 was previously assessed, the deficiency is $194,160.75.

The net taxable income for 1920 has been reduced by $7,400.00, contributions made in that year to the Citizen's Committee. This adjustment discloses a corrected net income of $1,813,876.62 instead of $1,821,276.62 indicated in letter dated December 16, 1926, and corrected tax liability of $1,110,197.56. Since $919,777.86 was previously assessed, the deficiency disclosed is $190,419.70.

The assessments are in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A copy of this letter has been furnished your representative, Mr. W. A. Seifert.

(Signed) C. R. NASH.

Mr. Eustace:

Defendant offers in evidence, as Defendant's Exhibit "F", a certified photostatic copy of letter dated February 21, 1927, to Mr. Richard B. Mellon, Pittsburgh, Pennsylvania, from D. H. Blair, Commissioner, being a deficiency letter for the 1920 individual tax of R. B. Mellon.

Mr. Booth:

Same objection.

The Court:

Objection overruled; exception noted.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "F".

Feb. 21, 1927.

Mr. Richard B. Mellon,
514 Smithfield Street,
Pittsburgh, Pa.

Sir:

The determination of your income tax liability for the taxable years 1919 and 1920 pursuant to an examination of your books of account and records, as set forth in office letter dated December 6, 1926, has been changed as a result of your protest, to disclose a deficiency in tax amounting to $335,617.43 for the years 1919 and 1920. The adjustments are shown in detail in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a peti-

tion and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60-D-WSL. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. Blair,
Commissioner.

By (Signed) C. R. Nash,
Assistant to the Commissioner.

Inclosures:
Statement
Form A.

STATEMENT

Feb. 21, 1927

In re: Richard B. Mellon
Deficiency

1919	$160,357.73	(Waiver expires 12/31/27)
1920	175,529.70	(Waiver expires 12/31/27)
	$335,617.43	

The above deficiencies in tax for 1919 and 1920 are the result of the audit of your returns for the respective years in connection with the report of the Internal Revenue Agent at Pittsburgh, Pennsylvania, dated November 8, 1921, and a conference held in this office on February 16, 1927, with your representative.

In the protests of January 29, and February 11, 1927, filed in your behalf, exception is taken to the disallowance of deduction claimed in your returns for contributions to the Citizen's Committee on the City Plan of Pittsburgh. In view of a recent ruling of the Bureau, a copy of which is attached to the protest of February 11, 1927, these deductions have been allowed.

In the protest of January 29, 1927, exception is also taken to the refusal of this office to allow as a deduction for the years involved, your aliquot part of an alleged value of $1,364,330.20 as of March 1, 1913, for the goodwill, trade marks, trade names, etc. of A. Overholt & Company. This item, however, is not mentioned in the subsequent protest of February 11, 1927. In this connection

you are advised that no deduction for obsolescence is allowable under a recent decision of the U. S. District Court in the case of the Red Wing Malting Company.

The above adjustment for allowable contributions results in no change in net taxable income for 1919 since 15% of your net income without the benefit of a deduction for contributions has already been allowed in accordance with Section 214 (a) (11), Revenue Act of 1918.

For 1920 your net taxable income as shown in office letter dated December 16, 1926, has been reduced by $8,400.00, representing contributions to the Citizen's Committee previously disallowed, resulting in a corrected net income of $1,000,459.28 and corrected tax liability of $581,932.98. Inasmuch as $406,673.28 was previously assessed, the deficiency in tax is $175,259.70.

The assessments are in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A copy of this letter has been furnished your representative, Mr. W. A. Seifert.

(Signed) C. R. NASH,

Thereupon counsel for defendant offered in evidence certified photostatic copy of letter dated Decem-

ber 16, 1926, to A. W. Mellon, Pittsburgh, from the Assistant to the Commissioner, being Bureau letter which immediately preceded the letter marked Exhibit "E", and which is referred to in said Exhibit "E", relating to the income tax of said plaintiff for the year 1920; the same being marked Defendant's Exhibit "G". Counsel stated it was offered for the purpose of meeting the denials of the allegations in the amended affidavit of defense, as set forth in the Reply, particularly in connection with Paragraph 4 of the Second Defense, which is denied by the Reply; and also Paragraph 11 of the Second Defense, part of which is denied by the Reply.

Mr. Booth:

I have no objection to the second portion of the offer; but I object to it, as not proof at all of the first part.

The Court:

You do not object to it in part, do I understand you correctly? That will be admitted then, and consideration given to it later.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "G".

December 16, 1926.

Mr. A. W. Mellon,
Woodland Road,
Pittsburgh, Pa.

Sir:

A reaudit of your income tax returns for 1919 and 1920 in connection with the report of the Internal Revenue Agent at Pittsburgh dated November 8, 1921, discloses an aggregate deficiency in tax of $390,267.95, details which are shown in the attached statement.

The recommendations of the Revenue Agent above indicated have been approved by this office after consideration of the protest filed with this office in connection therewith. If you acquiesce in the proposed adjustments as shown in this letter and the accompanying statement, you are requested to execute the enclosed form and forward it to this office for the attention of IT:PA:PYA:ARM. In the event that you acquiesce in a part of such proposed adjustments the form should be executed with respect to the items to which you agree.

If, however, you do not acquiesce in all of the proposed changes, you will be afforded an opportunity for hearing in the Unit at Washington upon request.

If no reply is received within ten days from the date of this letter it will be assumed that no hearing is desired and the Bureau will proceed to close the case in the usual manner.

If after said hearing, and consideration by this office of evidence or briefs of argument submitted, this office finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined, you will be allowed sixty days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,

Assistant to the Commissioner.

Enclosures:
Statement
Form 7858

STATEMENT

December 16, 1926

1919 Additional Tax	$195,038.25
(Waiver expires December 31, 1927.)	
1920 Additional Tax	195,229.70
(Waiver expires December 31, 1927.)	
Total	$390,267.95

The report of the examining officer has been approved with the following exceptions:

1919

Under the provisions of Treasury Decision 3685, the credit for 2% tax paid at source amounting to $4,811.09 has been eliminated from gross income.

In the reaudit of the partnership return of A. Overholt & Company, deduction for obsolescence of good will has been disallowed. This is in conformity with decision of the United States District Court for the District of Minnesota in the Red Wing Malting Company case recently upheld by the Circuit Court of Appeals. Deduction of $12,500 deferred organization expense has been disallowed since it was recommended for allowance in the audit of A. Overholt & Company (corporation) for 1918. These adjustments reduce your individual loss from $133,852.45, as shown in the report, to $122,980.92.

Deduction for contributions has been reduced by donations made to the following organizations in the amounts indicated:

Civic Club of Allegheny County	$ 100.00
Citizen's Committee on City Plan of Pittsburgh	1,350.00
National Federation of Construction Industries	250.00
Total	$1,700.00

The above contributions have been disallowed as deductions for the reason that they were not made to associations organized and operated exclusively for religious, charitable, scientific, educational purposes, etc. as outlined under Section 214 (a) (11) of the Revenue Act of 1918.

Revised net income is as follows:

Net income as shown by agent's report	$2,992.007.29

Plus: Decrease in partnership loss	$10,871.53	
Contributions disallowed	1,700.00	
	$12,571.53	
Less: Credit 2% tax paid at source	4,811.09	7,760.44
Revised income		$2,999,767.73
Dividends	$3,290,568.02	
Liberty Bond, Interest	15,924.86	
Personal Exemption.	2,400.00	3,308,892.88
Income subject to normal tax		None
Surtax on $2,999,767.73	$1,883,359.02	
Less tax paid at source	4,811.09	
	1,878,547.93	
Less tax previously assessed	1,683,509.68	
Additional tax	195,038.25	

1920

The following contributions have been disallowed for the reason that they were not made to corporations operated exclusively for religious, charitable, scientific, or educational purposes, etc., as outlined under Section 214 (a) (11) of the Revenue Act of 1918:

Civic Club of Allegheny County	$ 100.00
Citizens Committee on City Plan of Pittsburgh	7,400.00
Wilkinsburg Civic Club	10.00
Choate Memorial Building, Wallingford, Conn.	15,000.00
Total	$22,510.00

Upon a reaudit of the partnership return of A. Overholt & Company, the deduction for obsolescence of good will has been disallowed. Your income from this source has accordingly been increased from $205,754.62, as shown by the agent, to $281,779.95.

In accordance with Treasury Decision 3685, the 2% tax paid at the source on tax-free-covenant bonds amounting to $2,332.24 has been excluded from gross income.

A recomputation of your tax follows:

Net income as shown by Agent's report		$1,725,073.53
Plus: Increase in partnership income	$76,025.33	
Contributions disallowed	22,510.00	
	98,535.33	
Less: 2% tax paid at source	2,332.24	96,203.09
Corrected net income subject to surtax		$1,821,276.62
Personal exemptions	$ 2,200.00	
Dividends	3,353,819.92	3,356,019.92

Income subject to normal tax		None
Surtax on $1,821,276.62	$1,117,339.80	
Less 2% tax paid at source	2,332.24	
Balance	1,115,007.56	
Less tax previously assessed	919,777.86	
Further tax due	195,229.70	

This communication supersedes office letter dated March 8, 1923.

These proposed assessments are in addition to all outstanding and unpaid assessments appearing upon the Collector's lists.

In the event that you forward to this office a protest against any or all of the adjustments set forth in this communication, the statement of facts upon which you base your protest must be signed and sworn to by you.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Mr. Eustace:

Defendant offers in evidence certified photostatic copy of letter dated December 16, 1926, to Mr. Richard B. Mellon, Pittsburgh, Pennsylvania, from C. R. Nash, Assistant to the Commissioner, as Defendant's Exhibit "H".

Mr. Booth:
For the same purpose?

Mr. Eustace:
Same purpose.

Mr. Booth:
Admitted for the second purpose, and objected to for the first purpose.

The Court:
Well, it may be admitted, and consideration given to it later.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "H".

December 16, 1926.

Mr. Richard B. Mellon,
514 Smithfield Street,
Pittsburgh, Pa.

Sir:

A reaudit of your income tax returns for 1919 and 1920 in connection with the Internal Revenue Agent's report dated November 8, 1921, discloses an aggregate deficiency of $341,656.37, the details of which are shown in the attached statement.

The recommendations of the Revenue Agent above indicated have been approved by this office after consideration of the protest filed in connection therewith. If you acquiesce in the proposed adjustments as shown in this letter and the accompanying statement, you are

requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA—ARM. In the event that you acquiesce in a part of such proposed adjustments the form should be executed with respect to the items to which you agree.

If, however, you do not acquiesce in all of the proposed changes, you will be afforded an opportunity for hearing in the Unit at Washington on request.

If no reply is received within 10 days from the date of this letter it will be assumed that no hearing is desired and the Bureau will proceed to close the case in the usual manner.

If after said hearing and consideration by this office of evidence or briefs of argument submitted, the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,

(Signed) C. R. NASH,
Assistant to the Commissioner.

Enclosures:
Statement
Form A

STATEMENT.

In re: R. B. Mellon.

	Deficiency	
1919	$160,357.73	(Waiver expires December 31, 1927.)
1920	181,298.64	(Waiver expires December 31, 1927.)
	341,656.37	

The report of the examining officer has been approved with the following exceptions:

1919

Your individual loss through A. Overholt and Company, partnership, has been reduced from $133,852.45 to $122,980.92. This results from a reaudit of the partnership return in which obsolescence of good will has been denied in view of the decision of the United States District Court for the District of Minnesota in the Red Wing Malting Company case and deduction for organization expense has also been disallowed.

In accordance with Treasury Decision 3685, the credit for 2% tax paid at source has been excluded from gross income.

The deductions for contributions has been increased from $111,907.64 to $113,222.38 or to 15% of the revised net income.

The revised net income is as follows:

Net income as shown by Agent			$ 634,143.3
Plus: Decrease in partnership loss		$10,871.53	
Less: 2% tax paid at source	$ 2,106.60		
Increased contributions	1,314.74	3,421.34	7,450.1
Corrected Net Income			$ 641,593.4
Dividends	$1,03[illegible]651.78		
Liberty Bond Interest	12,757.20		1,047,408.9
No income subject to normal tax			—
Surtax on $641,593.50			$ 354,129.5
Less 2% tax paid at source			2,106.6
			352,023.2
Tax previously assessed			191,665.4
Additional tax			160,357.7

1920

The following contributions have been disallowed as deductions for the reason that they were not made to associations organized and operated exclusively for religious, charitable, scientific, educational purposes, etc. as outlined under Section 214 (a) (11) of the Revenue Act of 1918.

Citizens Committee on City Plan of Pittsburgh	$8,400.00
Urban League of Pittsburgh	50.00
Total	8,450.00

Upon a reaudit of the partnership return of A. Overholt & Company, the deduction for obsolescence of good will has been disallowed. Your income from this source has accordingly been increased from $205,754.62, as shown by the agent to $281,779.95.

In accordance with Treasury Decision 3685, the 2% tax paid at source on tax-free-covenant bonds amounting to $1942.49 has been excluded from gross income. A recomputation of tax follows:

Net income as shown by agent			$ 926,326.44
Plus: Increase in partnership income	$76,025.33		
Contributions disallowed	8,450.00		
	$84,475.33		
Less: 2% tax paid at source	1,942.49	82,532.84	
Corrected net income			$1,008,859.28
Less dividends	$ 995,142.83		
Liberty Bond Interest	3,642.96		998,785.79
Amount subject to normal tax			10,073.49

Amount subject to normal tax at 4%	4,000
Amount subject to normal tax at 8%	6,073
Normal tax at 4% ..	160
Normal tax at 8% ..	485
Surtax	589,268
Total	$ 589,914
Less tax paid at source	1,942
Balance	$ 587,971
Previously assessed	406,673
Further tax due ...	181,298

This communication supersedes office letter dated March 1923.

These proposed assessments are in addition to all outstandi and unpaid assessments appearing upon the Collector's lists.

In the event that you forward to this office a protest agai any or all of the adjustments set forth in this communication, t statement of facts upon which you base your protest must b signed and sworn to by you.

Payment of the tax should not be made until a bill is receiv from the Collector of Internal Revenue for your district, and r mittance should then be made to him.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "I", being a certified photostatic copy letter dated December 20, 1922, to Mr. A. W. Mellon from Deputy Commissioner, being the Bureau letter which immediately preceded the letter just admitted as Exhibit "G".

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "I".

December 20, 1922.

Mr. A. W. Mellon,
Woodland Road,
Pittsburgh, Pa.

Sir:

An examination of your income tax returns and of your books of account and records for the years 1919 and 1920, discloses an additional tax liability for the years 1919 and 1920, aggregating $328,975.47, as shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it

is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:SA:CCG, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,

Deputy Commissioner.

SUMMARY, DECEMBER 20, 1922.

1919 Additional tax $148,869.20
1920 Additional tax 180,106.27

Total additional tax $328,975.47

The revenue agent's report has been approved as submitted with the exception of adjustments made to the distributive share from A. Overholt and Company, partnership, which are fully explained in statement of Distributive Interest attached.

The deduction for obsolescence of good will has been computed in accordance with Advisory Tax Board Recommendation 44, using as a basis, the average earnings for the years 1910, 1911 and 1912, attributing a ten per cent return to the average tangible assets for the same period and capitalizing the remainder, as the average return attributable to good will, at fifteen per cent.

This computation discloses a value of good will as of March 1, 1913 of $435,575.00 which has been apportioned as follows:

1918 .....$203,886.10
1919 ..... 222,421.20
1920 ..... 9,267.70

$435,575.00

Year ended December 31, 1919

Net loss for normal tax shown by agent ..... $ 314,485.59

Loss—A. Overholt & Co. as shown in attached schedule	$ 197,121.32	
Loss—A. Overholt & Co. as shown by agent	133,852.45	63,268.87
Corrected loss for normal tax		$ 377,754.46
Dividends received	$3,290,568.02	
U. S. Bond interest	15,924.86	3,306,492.88
Corrected net income for surtax		$2,928,738.42
Normal tax	None	
Surtax	$1,837,189.97	
Credit 2% Tax Free Interest	4,811.09	
Total tax	$1,832,378.88	
Tax previously assessed	1,683,509.68	
Additional tax due	$ 148,869.20	

Year ended December 31, 1920

Net income for surtax shown by agent		$1,725,073.53
Income—A. Overholt & Co. as shown in attached schedule	$ 278,690.89	
Income—A. Overholt & Co. as shown by agent	205,754.62	72,936.27
Corrected net income for surtax		$1,798,009.80

Normal tax	None	
Surtax $1,102,216.37		
Credit 2% Tax Free Interest	2,332.24	
Total tax $1,099,884.13		
Tax previously assessed	919,777.86	
Additional tax due ....$	180,106.27	

STATEMENT OF DISTRIBUTIVE INTEREST

A. Overholt & Company

1919

Net loss reported by agent		$ 397,094.86
Obsolescence of good will corrected .....$	222,421.20	
Obsolescence of good will shown by agent	20,114.60	202,306.60
		$ 599,401.46
Lawyer's fees allowed by agent disallowed and deducted in 1918 corporation return		12,500.00
Corrected loss to be distributed		$ 586,901.46

	Loss	*L. B. Interest*	*Total*
A. W. Mellon ..	$195,633.82	$ 1,487.50	$ 197,121.32
R. B. Mellon...	195,633.82	1,487.50	197,121.32
H. C. Frick ...	195,633.82	1,487.50	197,121.32

1920		
Net income reported by agent		$ 617,263.8
Obsolescence of good will shown by agent	$ 228,076.01	
Obsolescence of good will corrected	9,267.20	218,808.8
Corrected income to be distributed		$ 836,072.6
A. W. Mellon	$ 278,690.89	
R. B. Mellon	278,690.89	
H. C. Frick	278,690.88	

Mr. Eustace:

Defendant offers in evidence Defendant's Exhi "J", being a certified photostatic copy of a letter dat December 20, 1922, to Mr. R. B. Mellon from t Deputy Commissioner.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in e dence is in words and figures as follows:

Defendant's Exhibit "J".

December 20, 1922.

Mr. R. B. Mellon,
6500 Fifth Avenue,
Pittsburgh, Pa.

Sir:

An examination of your income tax returns and your books of account and records for the years 19

and 1920 discloses an additional tax liability for the years 1919 and 1920, aggregating $295,279.99, as shown in detail in the attached statement.

In accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to the Commissioner of Internal Revenue, Washington, D. C., for the specific attention of IT:SA:CCG, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the

final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully,

(Signed) *Deputy Commissioner.*

SUMMARY, DECEMBER 20, 1922.

1919 Additional tax	$120,857.54
1920 Additional tax	174,422.45
Total additional tax	$295,279.99

The revenue agent's report has been approved as submitted with the exception of adjustments made to the distributive share from A. Overholt and Company, partnership, which are fully explained in Statement of Distributive Interest attached.

The deduction for obsolescence of good will has been computed in accordance with Advisory Tax Board Recommendation 44, using as a basis, the average earnings for the years 1910, 1911 and 1912, attributing a ten per cent return to the average tangible assets for the same period and capitalizing the remainder, as the average return attributable to good will, at fifteen per cent.

This computation discloses a value of good will as of March 1, 1913 of $435,575.00 which has been apportioned as follows:

1918	$203,886.10
1919	222,421.20
1920	9,267.70
	$435,575.00

Year ended December 31, 1919

Net income for surtax shown by agent		$ 643,143.30
Loss—A. Overholt & Co. shown in attached schedule	$ 197,121.32	
Loss—A. Overholt & Co. shown by agent	133,852.45	63,268.87
Corrected net income for surtax		$ 579,874.43
Normal tax	None	
Surtax	$ 314,629.64	
Credit 2% Tax Free Interest	2,106.61	
Total tax	$ 312,523.03	
Tax previously assessed	191,665.49	
Additional tax due	$ 120,857.54	

Year ended December 31, 1920

Net income for surtax shown by agent	$ 926,326.44

Income—A. Overholt & Co. shown in attached schedule	$ 278,690.89	
Income—A. Overholt & Co. shown by agent	206,754.62	72,936.27
Corrected net income for surtax		$ 999,262.71
Normal tax	None	
Surtax	$ 583,038.22	
Credit 2% Tax Free Interest	1,942.49	
Total tax	$ 581,095.73	
Tax previously assessed	406,673.28	
Additional tax due	$ 174,422.45	

STATEMENT OF DISTRIBUTIVE INTEREST

A. Overholt & Company

1919

Net loss reported by agent		$ 397,094.86
Obsolescence of good will corrected	$ 222,421.20	
Obsolescence of good will shown by agent	20,114.60	202,306.60
		$ 599,401.46
Lawyer's fees allowed by agent disallowed and deducted in 1919 corporation return		12,500.00

Corrected loss to be distributed			$ 586,901.46
	Loss	*L. B. Interest*	*Total*
A. W. Mellon ..	$195,633.82	$ 1,487.50	$ 197,121.32
R. B. Mellon ..	195,633.82	1,487.50	197,121.32
H. C. Frick	195,633.82	1,487.50	197,121.32
	1920		
Net income reported by agent			$ 617,263.85
Obsolescence of good will shown by agent	$ 228,076.01		
Obsolescence of good will corrected		9,267.20	218,808.81
Corrected income to be distributed			$ 836,072.66
A. W. Mellon	$ 278,690.89		
R. B. Mellon	278,690.89		
H. C. Frick	278,690.88		

Mr. Eustace:

Defendant now renews its offer of Defendant's Exhibit "C", being the copy of the revenue agent's report in connection with the tax liability of A. W. Mellon for the year 1920.

The Court:

How do these other exhibits change our former ruling in this respect?

Mr. Eustace:

These letters which have been admitted in evidence refer to the report, and start with the income as computed by the Commissioner and by the agent.

The Court:

Is it referred to in these various letters?

Mr. Eustace:

Calling attention to Defendant's Exhibit "J", a letter addressed to the plaintiff, the Commissioner makes this statement: "The revenue agent's report has been approved as submitted, with the exception of adjustments made to the distributive share from A. Overholt & Company, partnership, which are fully explained in Statement of Distributive Interest attached", and attached to the letter is a computation.

The Court:

I think we will admit that, subject to objection and exception, Mr. Booth, simply as showing the answers of the Department and in connection with it. Of course, it is admissible only for that purpose.

Mr. Booth:

It is not admissible, sir, as proving any of the facts.

Mr. Eustace:

It is not offered for that purpose.

Which said Defendant's Exhibit "C", duly certified, so offered and admitted in evidence, is in words and figures as follows:

Defendant's Exhibit "C".

(Page 444 a.)

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PAGE

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
PITTSBURGH DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

February 9, 1922.

Field Reports Control Section
Received Oct. 18 1922
Recorded Oct. 18 1922
Closed MAR 3 2 1927 19

Commissioner of Internal Revenue,

Washington, D. C.

Attention
Head. Field Division

The following individual report on the Income Tax Liability of A. F. Miller, Pittsburgh, Pa., for the years 1919 and 1920 is submitted herewith. See A. Company supplemental corporation report for the year 1919, supplemental partnership report for the same [illegible] report for the year 1920, and report of Miller Brothers Realty Company for 1920.

134-P

M.C.

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
PITTSBURGH DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

In re: A. W. Mellon
Pittsburgh, Pa. 23rd District

November 8, 1921.

Examining Officer
A. W. Smith, Agent

Examination Commenced
Apr. 11, 1921

Examination Completed
Nov. 8, 1921

Days spent on examination - 6

Internal Revenue Agent in Charge,
Pittsburgh, Penna.

The following report is submitted as the result of an investigation of the income and profits tax liability of the above named individual for the years 1919 and 1920.

Comparison has been made with retained copies for the years 1919 and 1920. Prior years were reported on previously.

Authority for examination - By direction of Revenue Agent in Charge.

Business - Banker and Financier.

Exemption Status - No Normal tax.

Wife's income - None

SUMMARY

Year	Add'l Tax due	
1919	189,993.97	
1920	132,697.69	196,745.66
Total	322,691.66	
Net additional tax due	$ 322,691.66	

Taxpayer has been fully advised of the findings and approves same.

Respectfully submitted,
(Signed)
Albert W. Smith,
Internal Revenue Agent.

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Mr. Mellon was financier and Banker and, until 1921, has been connected with various interests. Owing to the volume of his transactions, his affairs have been somewhat difficult to examine.

Mr. H. M. Johnson, his Accountant has excellent records to conform in detail with the information required by the Department and has used great care in compiling the returns. Notwithstanding this fact Mr. Johnson discovered that some transactions in the hands of Post & Flagg, and Moore, Leonard & Lynch, Brokers, in which income existed for the years 1915 to 1919, inclusive, had been omitted, as the items were not entered on his books. I found that Mr. Johnson was filing amended returns for these years and suggested to him that he withhold 1919 and I would incorporate this change in my report. Inasmuch as former years had been examined, he filed amended returns for the years 1915 to 1918, inclusive, paying an additional tax of approximately $135,000.00.

A similar transaction developed in my examination in which he included in Block [illegible] 1919, original return income from W. [illegible] Mellon Special Account amounting to $36,501.23. This had been separately and was entirely overlooked. Per the following schedule it will be noted that this is not income for 1919, but should have been distributed as follows:-

Year	Total	[illegible]
1915	15,648.00	[illegible]
[illegible]	24,226.97	[illegible]
[illegible]	8,419.82	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
1918 - Loss	[illegible]	[illegible]
1919 - Loss	[illegible]	[illegible]
	[illegible]	

I offered to [illegible] this [illegible] [illegible] of income [illegible] and stated that the taxpayer [illegible] this [illegible]. I feel that [illegible] and [illegible] [illegible] [illegible]

arwellow 1919 Revised 7/19/19

Line H (as per previous audit) 302450.41

Deductions

Block 1	Interest	794803.07	
	Taxes	101089.90	
	Bad Debts	55515.63	
	Contributions	179117.81	610526.56
			(308075.15)
Block 2	Dividends		3,290,568.07
	L & B Dist.		15,924.86
	Net Income		2,998,417.33
	Dividends	3,290,568.07	
	L&B Dist	15,924.86	

Due [illegible]

Property [illegible]

Fuel & power [illegible]

Overhead [illegible]

Additional [illegible]

Check

[illegible]

2

1919 Amended - revised

Block B	- Salaries etc		$11,188.75
C	- West Overton	$762.41	
	R B Mellon, Trustee	37865.68	
		46628.09	
	a/c overhaul to loss	122980.92	(76,352.83)
Block D	as per agent		1796.73
Block E	Do		(26083.10)
Block F	Do		240,554.72
Block G	Interest Wages	350.00	
	Bonds	6049.58	
	Bank	118439.83	
	W L Mellon Special A/c	26507.23	151,346.64
			302,450.41
Line H			
	Deductions		
Block I	Interest	274803.02	
	Taxes	101089.20	
	Contributions	177767.81	
	Bad Debts	55515.53	609,175.56
			(306,725.15)
Block K (a)	as per agent		3,290,548.02
(b)	Do		15924.86
			2,999,767.73

Reconciliation

Agent Income	2,992,007.29	
Less		
2% Credit tax at source	4811.09	
	2,987,196.20	
add		
Disallowed contributions	1700.00	
Reduced loss - Overhaul	10871.53	
	$2,999,767.73	

12571.53
4811.09
7760.44
6570
38802200
4656264
50442860
15993.97
195,038.25

No Normal tax
Surtax 1,883,359.02
Total tax 1,883,359.02
Tax pd at source 4811.09
1,878,547.93
Assessed 1,683,509.68
Addtl tax $195,038.25

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1919

(Page)

	Original		Amended		Difference
B - Salaries					
Ligonier Valley RR Co.	1800.00				
Aluminum Co. of Amer.	5000.00				
Union Iron Co.	1083.29				
A. Overholt & Co. (Treasurer)	2499.96				
Fees estimated Hendrie	805.00	11188.25		11188.25	
C - Partnership, etc.					
A. Overholt & Co.	(219514.31)		(133852.45)		85661.86 pl.
West Overton Dist. Co.	(1741.31)		8762.41		10503.72 pl.
Fiduciary R.B.Mellon					
Trustee	37865.68	(183389.94)	37865.68	(87224.36)	
D - Profits on sales					
per schedule		(127504.64)		1796.73	129301.37 pl
E - Rents					
per schedule original		(26083.10)		(26083.10)	
F - Int. from tax free bonds					
per schedule		240554.72		240554.72	
G - Other Income					
Interest from mtgs. etc.	350.00				
" " Foreign Bonds	6049.58				
" " Bank Dept.	118439.83				
2% Credit tax free Bond Interest.	4811.09				
W. L. Mellon special	26507.23	156157.73		156157.73	
H - Total from above		70923.02		296389.97	225466.95 pl
I - Deductions					
Interest	114066.30		274803.02		160736.72 pl
Taxes	101089.20		101089.20		
Contributions	179467.81		179467.81		
Bad debts	60942.71	455566.02	55515.53	610875.56	5427.18 -
J - Net income for Normal tax		(384643.00)		(314485.59)	70157.41 pl
K-a- Dividends		3068427.02		3290568.02	222141.00 pl
b - US Bond Interest		15924.86		15924.86	
L - Net income for surtax		2699708.88		2992007.29	292298.41 pl

COMPUTATION OF TAX

Normal tax			
Surtax	1000,000.00	583510.00	
	1992,007.29 at 65%	1294804.74	1878314.74
Credit 2% Tax Free Bond Interest			4811.09
Total tax liability			1873503.65
Amount of tax paid			1683509.68
Additional tax due 1919			189993.97

DIFFERENCES

Addition to net income As follows:-	292,298.41
Income from partnership - A. Overholt & Co., increased per partnership report herewith	85,661.86
Income from partnership - West Overton Dist. Co. increased per partnership report Feb. 2, 1921	10,503.72
Profits from sales of stock increased per Schedule below	129,301.37
Deduction disallowed for Bellefield Co., Bonds exchanged for stock under Art. 1564B -1875.00	
Deduction disallowed for Amortization of Premium paid for Bonds held, which constitute part of Cost to be taken at time of disposition of Bonds 3552.18 Total	5,427.18
Dividends received through Brokers and not included in original return per explanation above	222,141.00
Total additions	453,036.13
Allow interest paid by Brokers and omitted on Original return	160,736.72
Net addition to net income as above	292,298.41

Detail of 129,301.37 - Addition as follows:

Name of stocks & bonds sold	S.P.	Cost
Fairmount Brewing Co. stock	3560.65	34,300.00
J.J. McCormick & Co., Liq. stock	-	4,750.00
J.J. McCormick Co. stock	5000.00	21,591.80
Union Steel Co. Bonds	268750.00	261,875.00
" " " "	1800625.00	1754562.50
McClintock Marshall Const.Co. stock	360000.00	480,000.00
Real Estate W S Moorehead	34247.50)	
" " " " Depreciation	2600.00)	35,208.49
Crucible Steel Co.	104904.00	59,737.50
" " " Post & Flagg	175615.00	106,775.00
Union Steel Co. "	514637.50	499,987.50
Union Tank Line "	67892.50	53,747.51
Baldwin Locc. Co. Moon L & L	101085.00	107,625.00
Total	3428,917.15	3420,180.30
Less- share R.B. Mellon in Union Tank Line		6,960.12
Amended profit this report above		1,796.73
	3428,917.15	3428,917.15
Loss per original Return Block D		127,504.64
Profit per amended		1,796.73
Increase in net income block D as above		129,301.37

2

Exhibit No.

A. W. Mellon – 1920 Revised 7/19/27

Income (as per income audit)			2,038,107.62
Contributions			
Detroit Trader		239,341.00	
Penn Civic Club	100		
Wilkes C.C.	10		
Choate Mem'l	15000	15110.00	224,231.00
		Revised net income	1,810,876.62
Dividends		3,353,819.22	
LB Dist		4347.48	3,358,166.70
		No normal tax	
Surtax		1,112,529.80	
			1,112,529.80
Tax fed at source			2332.24
			1,110,197.56
assessed			919,777.86
additional			190,419.70

74000
6170

37000
44400
48100
1952 9.70
190,419.70

2 8

[redacted]

1920

Block B	Salaries etc		10,921.59	
C	Overholt	281,779.95		
	West Overton	52814.28		
	J.R. Mellon Trust	29050.63	373,644.86	
D	Loss on sales		(1,308,499.55)	
E	Rents		(112734.31)	
F	Int on tax free bonds		116611.97	
G	Bond interest	350.00		
	Sinking funds	6467.20		
	Bank interest	201794.45		
	Miscellaneous	2027.70	210,139.35	
			3,353,819.22	
H	Dividends		4347.48	
I	Int on Bonds		648,250.61	

Deductions

Interest	244,220.44	
Taxes	185,762.35	
Office Expenses	36,160.20	610,142.99
		2,038,107.62

M Contributions 203241.00

100.-		
10.-		
10.-	25,510.00	214,831.00
		1,821,276.62

	1,745,972.53	
	75,303.69	
	1,821,276.22	

Normal Taxes 117,209.00
Surtax 117,233.76
Profits 117,233.76
Net income assessed 117,774.76
195,229.70

29

1920

(Loss)

	Original		Amended		Difference
B - Salaries					
Ligonier V.R.R. Co.	1800.00				
Aluminum Co. of Amer.	5000.00				
A. Overholt & Co.	2499.96				
Sundry fees	1621.63	10921.59		10921.59	
C - Partnership, etc.					
A. Overholt & Co.	48350.74		205754.62	281,779.95	157403.88 pl
West Overton Dist. Co.	5960.55		52814.28 accepted		46853.73 pl
Fiduciary R.B.Mellon					
Trustee	39050.63	93361.92	39050.63 accepted	297619.53	
D - Profits on Sales					
per Schedule		(1308499.55)		(1308499.55)	
E - Rents					
Per schedule original		(112734.31)		(112734.31)	
F - Int. from tax free bonds		116611.97		116611.97	
G - Other income					
Interest from bonds	350.00		350.00		
" " Foreign Bonds	6467.20		6467.20		
" " Deposits	201294.45		201294.45		
2% Credit tax free					
Bonds Int.	2132.94		2332.24		199.30 pl
Underwriting	2027.70	212272.29	2027.70	212471.59	
H - Dividends		3353819.22		3353819.22	
I - Payable L.B. Int.		4347.48		4347.48	
J - Net income from above		2370100.61		2574557.52	204456.91 pl
K - Deduction					
Interest	448220.44				
Taxes	125762.35				
Office expenses	36160.20	610142.99		610142.99	
L - Net income from above		1759957.62		1964414.53	204456.91 pl
M - Contributions Schedule orig.	239341.00		211,53.17	239341.00	
N - Net income for tax		1520616.62		1725073.53	204456.91 pl
				1,721,216.62	
	COMPUTATION OF TAX				
Normal tax					
Surtax	1000,000.00			583510.00	
84,607.86	725,073.53 at 65%		533,849.80	471297.79	1054807.79
				1,117,339.80	
Credit 2% Tax free bond interest				2332.24	
Total tax liability				1,115,007.56	1052475.55
Amount of tax paid				919,229.86	919777.86
Additional tax due 1920				195,777.70	132697.69
				2.10	

DIFFERENCE

Net income increased as follows:	204,456.91
Partnership Income A. Overholt & Co. increased per report even date	197,403.68?
Partnership Comp.s - West Overton Dist. Co. increased per report even date	46,853.73?
Items in Other Income Credit 2% on Tax Free Bond Interest increased due to error in calculation	199.50
Total additions to net income	204,456.91

Loss was claimed on Penna. R.R. Co. stock sold between Mar. 1, 1913 - value and Cost not taken on original Return under Supreme Court decision Goodrich vs. Edwards - Mar. 28, 1921 Corp. Trust page 558. Amount 156,869.50 - Not allowed in this report per instructions dated May 27, 1921.

Same applies to his share of loss in 1919 on Joint Books 64,276.40, Swan Falls Power Co.

Taxpayer reserves right to file Claim for Credit in future.

2"

t

	Capital	dividends
1916	.547	— .547
1917	1.143	1.143
1918	1.417	1.417
1919	2.756	— 2.756
	2.586	1.528
1920		7.391

1125
7.391

1125
10125
3375
7875

$8314.875

1916
High market
for
average

50
32
82
41

41) 46125.00
1125 shares

2.1

A. W. KELLOM

Retail 1920 - Profits on Sales Stocks & Bonds - All purchased since 3/1/13 except P.R.R. Stock last item.

Stock Bonds Profits Sales - All purchased since 3/1/1913

Kind	S.P.	Cost	Gain or Loss
2nd Liberty Bonds	4255.75	5000.00	(746.25)
3rd "	109.68	122.53	(12.84)
4th "	31.80	37.49	(5.69)
Beech Creek	5880.00	4391.00	1489.00
Int. Rapid Transit Bonds	22950.00	29218.15	(6268.15)
Allegheny Ry. Stock	99114.50	165000.00	(65885.50)
American International Co.	8140.00	25000.00	(16860.00)
Cent. Coal Stock	1887.35	8148.75	(6761.40)
Beal Estate	500.00	847.84	(347.84)
2nd Liberty Bonds	28.25	32.75	(4.50)
4th "	28.43	33.33	(4.90)
U. S. Steel Stock	12655.00	12825.00	(170.00)
American Loco Co. stock	598650.00	434490.00	(27840.00)
Anaconda "	64,750.00	85,125.00	(47744.00)
Baldwin "	80972.50	98150.00	(17177.50)
B & O R.R. "	97805.00	248800.00	(151695.00)
C & N.W. Co. "	65510.00	81075.00	(17765. 00)
Great North Ore. "	24850.00	46125.00	(21275.00) *
Ill. Central "	127077.50	156987.50	(29910.00)
Inspiration Copper "	28054.50	45625.00	(17570.50)
P.C.C. & St. L. "	83568.75	80569.50	2999.25
P R R "	161882.50	219287.50	(57755.00)
Rep. I & S. Co. "	126187.00	186300.00	(60113.00)
S. Pac. R "	197981.50	225475.00	(27492.50)
Am. Loco. Co. "	1006467.50	1194325.00	(187857.50)
Republic S. Co. "	143907.50	188100.00	(44192.50)
Tennessee Copper "	7655.00	28600.00	(20945.00)
Mont. Power "	24750.00	47582.50	(22832.50)
P R R "	41830.00	58000.00	(16170.00)
Pgh. Coal Co. Pfd. "	17962.00	20625.00	(2663.00)
U S Steel Co. "	157757.50	188050.00	(30292.50)
Wabash A "	18054.00	46012.50	(27958.50)
Pgh. Field Club Bonds	1800.00	2000.00	(200.00)
Russian Govt. "	5925.75	103615.00	(97689.25)
2d L. B. "	8501.50	10000.00	(1498.50)
3d " "	65099.99	74150.00	(9050.01)
4th " "	43694.25	51000.00	(7305.75)
Victory "	720181.40	750033.00	(29851.60)
Aluminum Stock "	31620.00	50080.00	(18460.00)
P R R "	315302.13	487313.13	(172011.00)
Total	4204,738.90	5513,238.45	(1308,499.55)

* Non taxable dividends of { 1916 - [illegible] / 1917 - 1.41 / 1918 - [illegible] / 1919 - [illegible] } $.91 per share have been paid

File of Income Tax returns here on file for the purpose of showing dividends for the years not in the form

SCHEDULE OF TAX FREE BONDS

Name	1919	1920
International Graphite Co.	375.00	375.00
Ward Baking Company	12.00	12.00
Allegheny Valley St. Ry. Co.	3200.00	4200.00
Union Steel Co.	11458.34	-
Hill School Bonds	120.00	120.00
University Club	125.00	125.00
Country Club of Allegheny Co.	210.00	210.00
Pittsburgh Field Club	120.00	72.00
P C C & St. L. Ry. Co.	-	1124.82
Total personal books	15,620.34	6,238.82
Special Account		
Interboro Rapid Transit Co.		15,000.00
P C C & St. L. Ry.		350.65
Total special account		15,350.65
Joint Books		
Interboro Rapid Transit Co.	8,504.17	8,500.00
N. Y. Ship Bldg. Co.	123,045.00	123,045.00
Penna. Water Co.	50.00	50.00
Union Steel Co.	197,883.33	58,300.00
Wilkinsburg & Verona St. Ry.Co.	50.00	150.00
Total joint books	329,532.50	190,045.00
A. W. Mellon share	224,934.38	95,022.50
R. B. Mellon "	104,598.12	95,022.50
Total	329,532.50	190,045.00

RECAPITULATION

Personal books	15,620.34	6,238.82
Special account	-	15,350.65
Joint books	224,934.38	95,022.50
Total per return	240,554.72	116,611.97

2.14

INTEREST RECEIVED EXEMPT FROM TAX

Name		1919	1920
Federal Land Bank		39,225.00	91,750.00
Victory 3-3/4		16,071.75	9,843.75
City of Pittsburgh		4,687.50	37,500.00
" " Philadelphia		3,250.00	22,500.00
Boro of Farrell, Pa.		1,971.00	6,937.50
Country of Erie		-	11,250.00
City of Chester		-	15,000.00
Less - accrued int. paid		65,205.25	
Co. of Erie	2,875.00		
City of Pgh.	11,250.00		
" " Chester	4,987.50	19,112.50	
		46,092.75	193,781.25

A. W. MELLON - - CAPITAL ACCOUNT

Capital account - - Dec. 31, 1918 per former report		79,498,782.65
Net income for tax - 1919		2,992,007.29
Union Steel Bonds 3/1/13 value		11,875.00
Municipal U S Bond Int. non-taxable		46,092.75
Liberty Bond Interest non-taxable		5,469.37
Adjustment depreciation		5,184.95
Capital account adjustments		5,151.66
Interest allowed paid by Brokers		160,756.72
Loudon Bank Account		511.14
Asset - West Overton Distilling Co.		66,231.19
		82,792,082.70
1st Liberty Loan Bonds	75,000.00	
Income tax	1,895,512.59	
Income paid at source	4,811.09	
Dividends in hands of Brokers omitted	222,141.00	
Profits on sale of stock "	129,301.37	
Partnership losses disallowed "	96,165.58	
Loss - Bellefield Co., " "	1,875.00	
Amortisation Bond premium disallowed	3,552.18	
Personal withdrawals	249,341.03	2,677,699.84
Capital - Dec. 31, ~~1920~~ 1919		80,114,382.86
Income for tax 1920		1,725,073.53
Union Improvement Co. Return of capital 1902 up		44,525.11
War Bonds		393.96
Adjustment Donations transferred - Income a/c		180,973.87
Tax free L.B. Interest		2,762.50

2 15

Book Profit Centre Ave, Lot sold 3/1/13 value			15,916.70
Appraisal property			215,144.21
Municipal & U S Bond Interest			223,278.75
			82, 522,391.49
Diff. between 3/1/13 value & cost	Loss on		
P R R stock disallowed	156,869.58		
Income tax	1,686,672.76		
Joint a/c donations	42,314.25		
Credit for Tax Free Bond Int.	2,352.24		
Partnership profits increased	204,257.61		
Trustee property adjustment	2,600.00		
Mollintic Marshall Dividend 1917 Remainder	156,128.70		
Personal withdrawals	497,576.08		
			2,748,751.22
Capital Dec. 31, 1920			79,773,640.27

Liberty Bond Schedules filed with original returns are correct.

Union Steel Bond profit 11,875.00 Non-taxable is based on same value as of Mar. 1, 1913 as accepted in prior years for same bonds.

Union Improvement Co., 44,525.11 is return of capital based upon information received from this Company.

Book Profit on sale of Centre Ave., lot 15,916.70 is based on appraisal of Jan. F. Donavan Real Estate Broker, Columbia Natl Bank Bldg., as follows:-

3/1/13 value based on sales adjacent		24,165.00
Selling price	24,191.00	
Less - Expenses in selling	1,109.50	23,002.50
Profit		none

The above examination was based on Returned Copies of Returns held by taxpayer, as I had no transcripts.

(Signed)

Albert W. Smith,
Internal Revenue Agent.

2 16 6

Mr. Eustace:

Defendant now renews its offer of Exhibit "D", being the same type of instrument as Exhibit "C" just admitted in evidence—the revenue agent's report of the examination of the income report of R. B. Mellon for the year 1920.

The Court:

This will also be admitted; the same thing is true as to this exhibit. Objection overruled and an exception.

Which said Defendant's Exhibit "D", duly certified, so offered and admitted in evidence, is in words and figures as follows:

Defendant's Exhibit "D".
(Page 446 a.)

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
PITTSBURGH DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

February 9, 1922.

Field Reports Control Section
Received Oct. 18 1922
Recorded Oct. 18 1922
Closed 19

Commissioner of Internal Revenue,
Washington, D. C.

Attention,
Head, Field Division.

The following individual report on the Income Tax Liability of R. B. Mellon, Pittsburgh, Pa., for the years 1919 and 1920, is submitted herewith, the A. Overholt & Company supplemental corporation report for the year 1918, supplemental partnership report for the year 1919, partnership report for the year [illegible] partnership report of West Overton Distilling Company for the year 1920.

The examination on above was made by Internal Revenue Agent Albert V. Smith, and the reports were submitted to former Revenue Agent in Charge J. [illegible] on November 8, 1922, but owing to the general condition of the work in the office, the reports were not signed until the present time.

Owing to the question of abatements and overwill in the corporation and partnership reports of A. Overholt & Company, it is thought that all of the above named reports should be audited by the Department at the same time, which is the reason for transmitting them together.

A copy of this report has been furnished the Taxpayer.

Albert V. Smith
Acting Revenue Agent in Charge.

AVS-MM.

601

133-P

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

In re: R. B. Mellon,
Pittsburgh, Pa., 23rd Dist.
of Penna.

November 8, 1921

Examining Officer	Examination Commenced	Examination Completed
Albert W. Smith, Agt.	Apr. 11, 1921	Nov. 8, 1921

Days spent on the examination 6

Internal Revenue Agent in Charge,
Pittsburgh, Penna.

The following report is submitted as the result of an investigation of the income and profits tax liability of the above named individual for the years 1919 and 1920.

Comparison has been made with retained copies for the years 1919 and 1920. Prior years were examined previously.

Revenue Agent in Charge. Authority for examination - Direction of

Business - Banker & Financier.

with wife. No Normal tax. Exemption Status - Married and living

change. Wife's income - Separate report. No.

SUMMARY

Year	Add'l Tax
1919	155,589.61
1920	127,743.15
Total	283,332.76
Net add'l tax	283,332.76

142

Taxpayer has been fully advised of the findings.

The taxpayer reserves right to deduct Loss in 1919 of $64,276.40, his share on Swan Falls Power Co., joint books as cost in excess of Mar. 1, 1913. Value should decision be made that the Government cannot take less than cost on Losses. Otherwise this report is agreed to in connection with agreement on A. Overholt & Co., report submitted herewith.

(Signed)

Albert W. Smith,
Internal Revenue Agent.

1919 - (Losses)	Original	Amended	Difference
B - Salaries			
Aluminum Co. of America	5,000.00		
Ligonier V.R.R. Co.	1,800.00		
A. Overholt & Co.	2,499.96		
Sundry fees	785.00		
Total Block B	10,084.96	10,084.96	
C - Partnership, etc.			
A. Overholt & Co.	(219,514.31)	(~~155,852.45~~) 122,980.97	,661.86 pl.
West Overton Dist.Co.	1,741.32)	(8,762.41	10,503.73 pl.
Fiduciary R.B.Mellon, Treas.	37,865.68	37,865.68	
Total Block C	(183,389.95)	(87,224.36)	96,165.59 pl.
D - Profits on sales of stock			
Per schedules	(374,521.77)	(186,172.12)	188,349.65 pl.
E - Rents per schedule	(30,248.89)	(30,248.89)	
F - Tax free bond Int.	105,330.37	105,330.37	
G - Other income			
Bond Interest	375.00		
" " Joint	14,458.08		
" " Foreign	6,025.84		
Interest	118,886.25		
Cr. 2% T.F. Int.	2,106.60		
W. L. Mellon special	26,507.22		
Total Block G	168,358.99	168,358.99	
H - Totals from above	(304,386.29)	(19,871.05)	284,515.24 pl.

H3

R B Mellon - 1919 Revised

Block B	Salaries		10084.96
Block C	Rest Overton	8762.41	
	Mellon Trust	37865.68	
		46628.09	
	Overhead	1x2980.92	(76352.83)
Block D	Sales of Stock		(186172.12)
Block E	Rents		(30248.89)
Block F	Tax free funds		105830.37
Block G	Mining & Timber	[illegible]	
	Bond Interest	2750.00	
		14456.06	
		6225.64	
	Mining		
	R B Mellon Trust	2650.22	166252.39
			(11106.14)
Block L	Int Paid	14289.19	
	Taxes	8513.53	
	Bad Debts	5313.97	
	Contributions	113xx.38	
	1670		39709.38
			(4[illegible])
			1054.[illegible]
			1[illegible]
			4[illegible]
Block K(1)	Dividends		
	L B Interest		
	Net Income		

Recapitulation [illegible] 634142.30

agent = Income

add

reconciliation

Loss

of cash

[illegible] 74501.6

[illegible] 641,69[illegible]

Income [illegible]

Agent [illegible]

[illegible] 1[illegible]

The reserved [illegible]

Contra

[illegible]

Reserved

Cash [illegible]

	Original	Amended	Difference
I - Deductions			
Interest	142,839.19	142,839.19	
Taxes	85,513.83	85,513.83	
Bad debts	55,008.97	53,133.97	1,875.00
Contributions	68,700.71	111,907.64	43,206.93
Total deductions	[illegible]	[illegible]	[illegible]
[illegible] - Totals from above	[illegible]	(415,235.68)	[illegible]
[illegible] Dividends	1034,651.78	1034,651.78	
[illegible] Interest	11,106.26	12,757.20	[illegible]
[illegible] Income	[illegible]	[illegible]	[illegible]

[illegible]

[illegible] tax

[illegible] $46,610.00

[illegible]

LIBERTY BOND SCHEDULE AMENDED

	4-1/4-2nd Conv. 3rd	4-1/4% 3rd	4-1/4% 4th	Cert. Ind. 4%
Int. rec'd.	1,062.50	3,758.41	2,160.02	11,301.26
Bonds prins.	25,000.00	88,433.33	50,824.00	282,531.50
Exemptions				
a - $ 5,000.00	5,000.00			
b - 20,000.00	20,000.00			
c - 30,000.00	-	30,000.00		
d - 45,000.00	-	45,000.00		
e - 30,000.00	-	-	30,000.00	
Excess Pr.	None	13,433.33	20,824.00	282,531.50
Tax. Int.	-	570.92	885.02	11,301.26

Total taxable interest amended	12,757.20
" " " original	11,101.26
Additional taxable interest	1,655.94

The increase in income from partnerships A. Overholt & Co., and Penn Overholt Distilling Co., is based on examination of these returns, report for which I submit at this time on 1920, 1919 having been submitted Feb. 2, 1921.

The Victory Loan subscriptions entitled taxpayer to the maximum allowance.

On Original Return Loss was taken on Sales of Stock amounting to $74,521.77 per list submitted with return. I checked this list and found it to be correct with the exception of one item as follows:

Morris Brown & Co., Brokers	
Selling Price	746,375.00
Cost	1043,227.77
Loss	296,852.77

These transactions in the hands of above Brokers were closed at various dated in 1916, 1917, 1918 and 1919 and only 108,503.12 applies to 1919. He will file Amended Return for 1918 claiming loss in that year for 120,424.53, which is correct. $52,517.56 belongs to 1917, which is now deductible under Ruling Bulletin No. 4, page 163, $15,407.56 belongs to 1916 per Exhibit "A" attached herewith.

15,407.56
52,517.56
120,424.53
108,503.12
296,852.77

H6

R B Mellon - 1920 Revised 7/19/27

	Salaries		9624.96
	Partnerships		
	Overholt Co	2817.79.95 ✓	
	Mellon Overton	53814.28 ✓	
	J R Trust	29056.63	373,644.86
	Loss on sales securities		(164,459.39) -
	Rents		(51,135.44) -
	Int on Tax free bonds		97127.50 ✓
	Other Income		20343.83 -
	Dividends		99514.83 -
	L B Interest		3647.96 -
			1,467,029.11
Block K	General deductions		333704.82
			1,133,324.29
	Contributions		
	Total as per list	13915.01	
	Less Metal Fraternal League	50.00	13865.01
	Revised Income		1,000,459.28
	Dividends	99514.83	
	L. B. Int.	3647.96	998,785.79.
			1673.49
			470
			66,939 6
	normal tax	66.94	
	surtax	583808.53	
		583,875.47	
	2% flat source	1942.49	
		581932.98	
	assessed	406673.28	
	additional	175,259.70	

N7

Correct net income 1,008,859.28

Less:
Dividend 995,142.83
L.B. Interest 3642.96 998,786.79

Amt subject to n. tax 10,073.49
" " " n.t. @ 4% 4,000.00
" " " " " 8% 6,073.49

Normal tax at 4% $ 160.00
" " at 8% 485.88
Surtax 589,268.53
589,914.41
Tax pd. at source 1,942.49
Balance 587,971.92
Previously assessed 406,673.28
Further tax due 181,298.64

assumed that personal exemptions was allowed on wife return as in 1941. Cannot locate wife repeat.

over

N9

Reconciliation

Income as per Agent $926,326.44

Add

Disallowed contributions $450.00

Rosenbluth & Co 76,225.33

$1,001,801.77

Less

770 tax credit 1,442.49

$1,000,359.28

Block	1920 Original	Amended	Difference
B - Salaries			
A Overholt & Co.	2,499.96		
Ligonier Valley R.R. Co.	1,050.00		
Aluminum Co. of Amer.	5,000.00		
Sundry Fees	1,075.00		
Total Block B	9,624.96 ✓	9,624.96	
C - Partnerships, etc.		281,779.95	
A. Overholt & Co.	48,350.74	205,754.62 checked	157,403.88 pl.
West Overton Dist. Co.	5,900.55	52,814.28 checked	46,853.73 pl.
Fiduciary	39,050.62	39,050.63 checked	
Total Block C	93,351.92 ✓	297,619.53 ✓	204,257.61 pl.
D - Profits from Sale			
See schedule	(164,459.39)	(164,459.39) ✓	(Depreciation ?)
E - Rents			
See schedule	(51,135.44) ✓	(51,135.44) ✓	
F - Int. tax free bonds	97,124.50 ✓	97,124.50 ✓	
G - Other income			
Interest	375.00	375.00	
" Foreign	6,273.38	6,273.38	
" Joint	196,785.45	196,795.45	10.00 pl.
Tax Free int. source	1,942.49	1,942.49	
	205,375.32 ✓	205,386.32 ✓	10.00 pl.
H - Dividends			
Personal books	269,145.92		
Joint "	725,996.91		
Total dividends	995,142.83	995,142.83 ✓	
I - L. B. Interest			
Personal books	3,432.65 ✓		
Joint Books	210.31 ✓		
Total Block I	3,642.96	3,642.96 ✓	
J - Totals	1188,675.66	1392,946.27 ✓	204,267.61 pl.
K - Deductions			
Interest	81,833.96 ✓		
" Joint	134,492.14 ✓		
Taxes	85,934.01 ✓		
" joint	267.52 ✓		
Business expense	9,823.20		
Bad debts	2,125.00 ✓		
Bus. expense joint	17,851.62		

410

W.L. Mellon special	1,377.37		
Total Block K	333,704.82 ✓	333,704.82 ✓	
L - Total from above	854,973.84	1059,241.45 ✓	204,267.61 d
Contributions	128,245.08	132,915.01 ✓	4,668.93 pl
Net income	726,727.76	925,326.44 ✓	199,598.68 pl
Normal tax			-0-
Surtax	500,000.00	263,510.00 ✓	
	426,326.44 64%	272,848.92 ✓	536,358.92 ✓
Credit tax Free Bond Int. 2%			1,942.49 ✓
Total tax liability			534,416.43 ✓
Amount of tax paid			406,673.28 ✓
Additional tax due 1920			127,743.15 ✓

DIFFERENCES

Net income increased	199,598.68 ✓
As follows:	
Profits increased Partnership A.Overholt & Co. per report herewith	157,403.88
Profits increased partnership - West Overton Dist. Co. - per report herewith	46,853.73
Error calcualtion - Other income	10.00
Total additions to net income	204,267.61 ✓
Less - Contributions increased to list - original return	4,668.93
Net addition to net income	199,598.68 ✓

Liberty Bond Schedule for 1920 was correct.

In the year 1919 in "Other Income " is included an item of $6,507.22 from W. L. Mellon Special Account, which I feel should read a loss of 1,886.47 in 1919 Loss 1918 - 2,102.15 and Profits 6,549.40 in 1917, 6245.51 in 1916, 5139.94 in 1915, 8075.66 in 1914, and 6549.40 in 1913 - but Taxpayer prefers to report it all in 1919 and waives any claim on making change. This was overlooked in original return, being kept separately. I offered to make the change. See report of A. W. Mellon this date explaining this transaction in full.

See Exhibit "A" attached for correction on Profits on Sales of Stocks and Bonds handled through Morris Brown & Co., Brokers - Balance of list as submitted with original return is correct.

Taxpayer agrees to above findings with reservation to make claim later on Swan Falls Power Co., in 1919.

(Signed) Albert W. Smith, Int. Rev. Agent.

H 11

R. B. MELLON EXHIBIT "A"

Profits on Sale of Stock

	1916 Sale	1916 Cost	1916 P & L	1917 Sale	1917 Cost	1917 P & L	1918 Sale	1918 Cost	1918 P & L	1919 Sale	1919 Cost
Penna. R. R. Stock 500 sh - 1918 3600 " - 1919							22477.50	29493.75	(7016.25)	163778.00	208
B & O R R Stock 1800 sh - 1916 500 " - 1917 2100 " - 1918 1900 " - 1919	145585.50	148250.00	(2664.50)	39877.50	44450.00	(4772.50)	117391.00	183300.00	(65909.00)	87053.00	149
N Y N H & Hartford RR 600 shs - 1917 2000 " - 1918 200 shs - 1919				19628.00	40050.00	(20422.00)	101725.00	119236.50	(17511.50)	6592.00	8
A T & S Fe. Stock 200 shs - 1918							42467.50	53437.50	(10970.00)		
Clearing charges		12743.06	(12743.06)		27323.06	(27323.06)		19017.78	(19017.78)		3
Total	145585.50	160993.06	(15407.56)	59505.50	111823.06	(52317.56)	284061.00	404485.53	(120424.53)	257423.00	385

284061
1204453

257
108

RECAPITULATION

Year	Sales	Cost	P & L
1916	145585.50	160993.06	(15407.56)
1917	59505.50	111823.06	(52317.56)

1919

L		Sale	Cost	P & L
	,25)	163778.00	206418.75	(42640.75)
	00)	87053.00	149925.00	(62872.00)
	50)	6592.00	6225.00	367.00
	00)			
	32)		3357.37	(3357.37)
	53)	357423.00	365926.12	(108503.12)

257423.00
108503.12

Mr. Eustace:

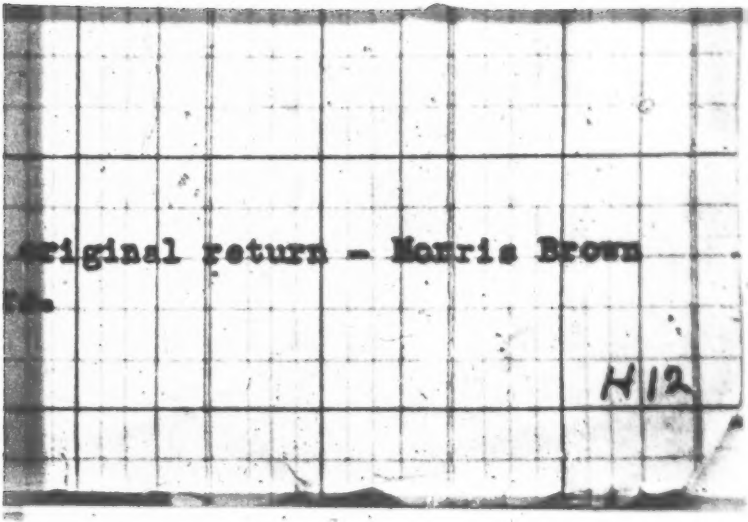
Defendant now offers Defendant's Exhibit "K", being a certified photostatic copy of revenue agent's report dated November 8, 1921, covering the examination of the affairs of A. Overholt & Company for the year 1920, which is referred to and incorporated in the letters heretofore admitted as exhibits and in the Exhibits "C" and "D".

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

	1918	284061.00	404485.53	(120424.53)			
	1919	357423.00	465928.18	(108505.18)	282852.77	188549.85	See Schedule original return
		741975.00	1049227.77				& Co. Brokers.
All purchased since Mar. 1, 1913							


riginal return - Morris Brown
H12

Defendant's Exhibit "K".
(Page 448 a.)

131-P

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

November 8, 1921

Time consumed
Overholt 6 days
E S Martin 6 days

Internal Revenue Agent in Charge,
Pittsburgh, Penna.

In re: A. Overholt & Co., Pittsburgh, Pa.
Partnership - Amended

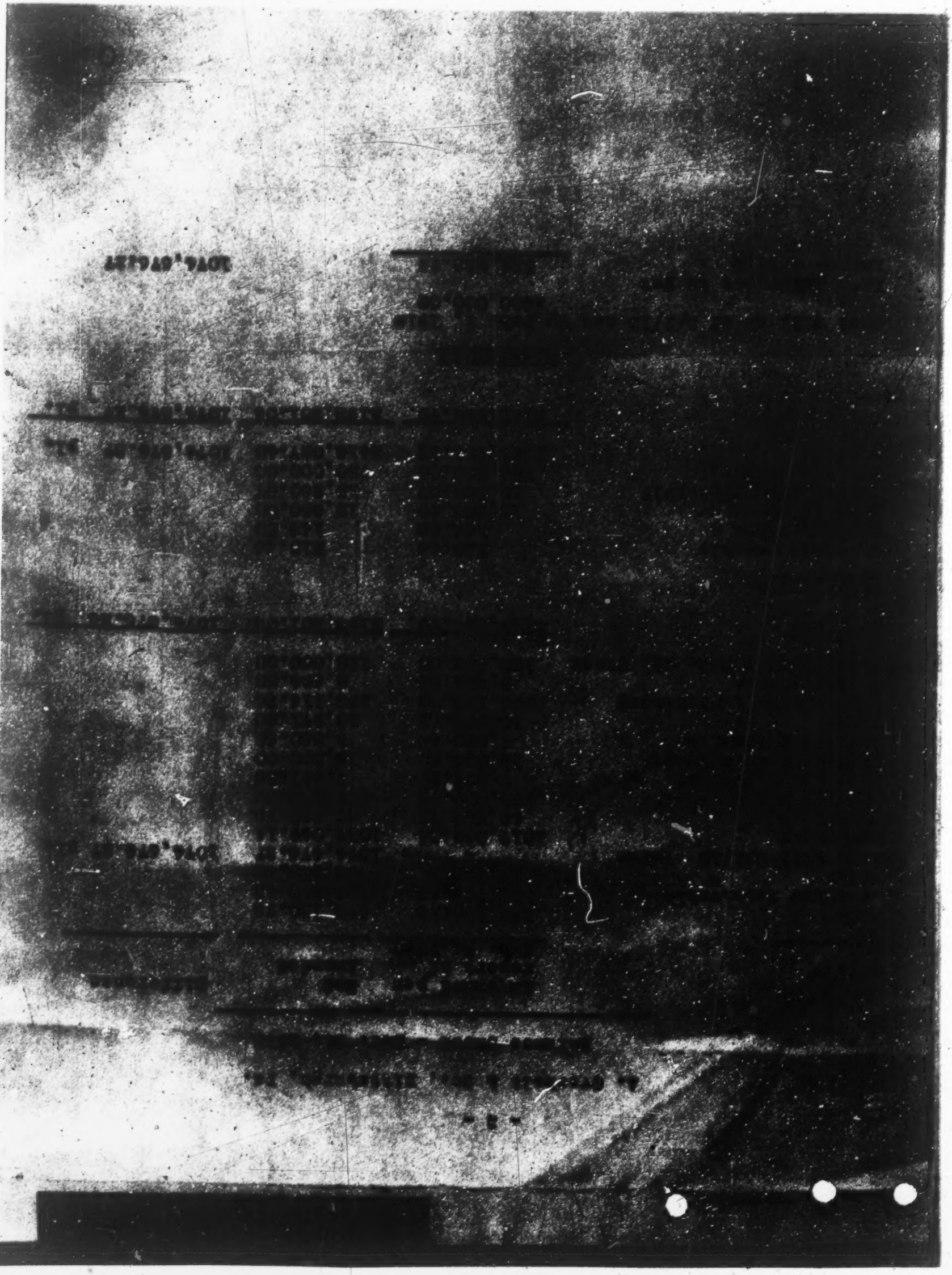
In connection with supplemental report of even date amending report on Consolidated Corporations A. Overholt & Co., & West Overton Distilling Co., for the year 1918, I submit herewith supplemental report on A. Overholt & Co., partnership for the year 1919 and report on year 1920, and would refer to [redacted] for explanation in regard to settlement of [redacted] and for explanation allowed [redacted] fully explained in Deputy [redacted] report, Exhibits A, B, C, D, E, F, G and H.

No depreciation was taken on Buildings and Machinery in 1920, as their values had been reduced to practically their scrap value.

[redacted]

[redacted]

[redacted]



[redacted]

Good will 3/1/13 value
Prior year 1800,000.00
Less allowance to net inc.
1918-1919-1920 773,514.24
Prior years
Income tax due

Prior years Capital account decreased as above.			126,962.84
	1950,555.58		
	3255,600.09	3255,600.09	
Dec. 31, 1919 - Capital account corrected			1909,426.18
Net income corrected			617,263.85
			2525,690.03
Donations		3,960.00	
Withdrawals 50,000.00 Exp. 750,600.00 bills receivable		800,600.00	804,560.00
Dec. 31, 1920 - Capital account corrected			1721,130.03

Dec 31, 1919 - Cap per books

Add
Bills Payable
Prepaid Taxes
Income Taxes 1918-19-18
Total

Deduct
Organization Expense
West Brenton Dept C

Dec 31, 1919 - Cap as adjusted

Dr Cr

A. Overholt & Company Pittsburgh, Penna.

Profit & Loss

Difference	1919	1918	Difference
	[redacted]	[redacted]	
	480,756.11	480,756.11	
	54,400.71	[redacted]	
	1017,048.14	[redacted]	
	1071,448.85	[redacted]	
	500,000.00	[redacted]	
	171,654.71	[redacted]	
	[redacted]	[redacted]	1446.60 plus
	[redacted]	[redacted]	1446.60 -
	[redacted]	[redacted]	1446.60 -
	[redacted]	[redacted]	650.00 plus
	[redacted]	[redacted]	614.90 -
	283.75		

n for 1919

L.E.Int.

(133264.95)	Loss	1487.50 (133852.45)
(133264.95)	"	1487.50 (133852.45)
(133264.95)	"	1487.50 (133852.45)
(397094.85)	"	401557.35

6

[redacted]. Partnership

[redacted] Loss

	Per Books	Amended	Difference
	[illegible].53	1335,326.53	
	[illegible].67	900,365.52	198,558.85 pl.
	[illegible]	[illegible].57	198,558.85 pl.
		[illegible].56	
		[illegible].01	1,410.00 -
		18,[illegible].77	
		18,[illegible].00	
		[illegible].86	
		[illegible].90	
		[illegible].45	
		[illegible].55	
		[illegible].08	
		[illegible].87	[illegible].00 -
		[illegible]	[illegible].00 -
		[illegible]	[illegible] -

Mr. Eustace:

Defendant now offers in evidence as Defendant's Exhibit "L", a certified photostatic copy of revenue agent's report dated November 8, 1921, covering the examination of the affairs of West Overton Distilling Company for the year 1920.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "L".
(Page 450 a.)

	1918 Amended	1918 2nd Amended	Differenc
	2378,250.00	2378,250.00	-

130-P

M.C.

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
PITTSBURGH DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

November 8, 1921

Internal Revenue Agent in Charge,
Pittsburgh, Penna.

In re: West Overton Distilling Co.

In connection with report of even date on A. Overholt & Co., I submit herewith report for the year 1920 on Partnership, West Overton Distilling Co., with offices Frick Bldg., Pittsburgh, Pa., and Scottdale, Pa., Revenue Agent, E. S. Martin examined the books and it is from his figures I have compiled the results herewith.

There is no change on this partnership on report submitted by Revenue Agent Thos. M. Miller and myself on Feb. 2, 1921.

The Liquidating [illegible] paid in 1920 was disallowed and the [illegible] condition that the [illegible] agrees to definitely settle on this basis - I recommend that the Department close the same.

No depreciation allowed, as Obsolescence to Scrap value was previously taken.

See pages 3, 3, 4 and 5.

Refer to report on A. Overholt & Co., for Agreement.

Albert W. Smith,
Internal Revenue Agent.

WEST OVERTON DISTILLING COMPANY

Profit & Loss

	Difference	1918 Amended	1919 2nd Amended	Difference	1920 Amended	1920 2nd Amended	Difference
		179,587.68			218,060.21		
		130,851.43			181,138.00		
		130,851.43			181,138.00		
		181,125.89			93,819.44		
		8,736.46			87,318.56		
		169,789.29			190,734.75		
		830.91					
		170,620.20			190,734.75		
		141,913.35			32,691.91		
		28,712.85			158,442.84		

Carter L.B.	Partnership 1919	Partnership 1920
141.67	8762.41	52814.28
141.67	8762.41	52814.28
141.68	8762.41	52814.28
		158442.84

	1918	1918 Amended
[illegible]	[illegible]	
[illegible]	[illegible]	
[illegible]	[illegible]	

WEST OVERTON DISTILLING CO.

1 9 2 0
Profit & Loss

	Per Books	Amended	Difference
Sales Less returns	218,050.31	218,050.31	
Deductions			
Labor	8,563.92	8,188.92	375.00 -
Taxes	2,236.44	2,236.44	
Depreciation	1,500.00	1,739.49	239.49 pl.
Loss on Liberty Bonds	507.50	507.50	
Storage	1,211.40	1,211.40	
Insurance	5,528.16	5,528.16	
Other expenses - Bad debts, etc.	13,418.31	11,650.00	1,768.31 -
Liquidation	138,657.38	-	138,657.38 -
Salesmen's Commissions	1,230.00	1,230.00	
Inventory Jan. 1, 1920	90,965.83	121,135.00	30,169.17 pl.
	263,818.94	153,425.91	110,392.03 -
Inventory Dec. 31, 1920	63,650.27	93,819.44	30,169.17 pl.
Total deductions	200,168.67	59607.47	140,561.20 -
Net income	17,881.64	158,442.84	140,561.20 pl.

DIFFERENCES

Donations Xmas Gifts - employees disallowed		375.00
" Presents to employees		1,768.31
Profits credited to liquidation account		138,657.38
		140,800.69
5% Depreciation on mixed asset allowed	1739.49	
Less - amount taken	1500.00	239.49
Total addition to net income		140,561.20

Net income to Partners as follows:

A. W. Mellon	1/3	52,814.28
R. B. Mellon	1/3	52,814.28
H. C. Frick	1/3	52,814.28

#3

WEST OVERTON DISTILLING COMPANY
BALANCE SHEETS AMENDED DEC. 31, 1919 - 1920

Assets	Dec. 31, 1919	Dec.31, 1920
Cash	(353.11)	196,587.60
Accounts receivable	4.88	149.50
Land Bldgs. & Machinery	34,789.79	36,131.80
Old Whiskey Inventory	121,135.00	93,819.44
Supplies	14,504.99	13,899.62
Stamps	972.10	538.00
Liberty Bonds	10,000.00	
Licenses	58.69	
Prepaid taxes	1,509.38	1,017.94
Prepaid water rent	22.50	22.50
Prepaid insurance	3,209.36	3,068.21
US Liberty Bond Int. accured	109.49	109.49
Deferred expenses	1,342.01	-
	187,305.08	345,344.10

Liabilities				
1918 Income tax		699.11	699.11	
1919 "		2,862.96	2,862.96	
Notes payable - A. Overholt Co.		20,000.00	20,000.00	
Res. for deprec.		-	1,739.49	
Net worth- H.C.Frick	54,581.00	-		106680.84
A.W. Mellon	54,581.01			106680.86
R.B. Mellon	54,581.00	163,743.01	320042.54	106680.84
		187,305.08	345344.10	

CAPITAL ACCOUNT

Capital account amended - Dec. 31, 1919		163743.01
Net income amended 1920		158442.84
		322185.85
Donations		2143.31
Capital account - Dec. 31, 1920		320042.54
Profit 1920 - H. C. Frick 1/3	52,814.28	
A. W. Mellon 1/3	52,814.28	
R. B. Mellon 1/3	52,814.28	
Total	158,442.84	

WEST OVERTON DISTILLING CO.
1 9 2 0
BALANCE SHEET

Assets	Per Books Dec.31,1920	Amended	Difference
Cash	196,587.60	196,587.60	
Accounts receivable	149.50	149.50	
Land Bldgs. & Mchry.	48,500.00	36,131.80	12,368.20 -
Old Whiskey Inventory	63,650.27	93,819.44	30,169.17 pl
Supplies	13,899.62	13,899.62	
Stamps	538.00	538.00	
Prepaid taxes, ins. etc.	4,108.65	4,108.65	
U S Liberty Bond accrued	-	109.49	109.49 pl
	327,433.64	345,344.10	17,910.46 pl
Liabilities			
Income tax 1916		699.11	
" 1917		2,862.96	3,562.07 pl
Bills payable - A.Overholt Co.		20,000.00	20,000.00 pl
Res. for deprec.		1,739.49	1,739.49 pl
Capital account	327,433.64	320,042.54	7,391.10 -
	327,433.64	345,344.10	17,910.46 pl

DIFFERENCES

	Add capital	Deduct Capital
Dr - Capital Cr. asset obsolescence prior year 15,210.21		
Dr - Asset - Cr. Capital amt. chgd. off 1920 1,500.00		
Dr Asset - Cr. Deferred exp. 1920 1,342.01		12,368.20
" Inv. cr. capital prior year change	30,169.17	
Dr L.B.int. accrued cr. capital prior year	109.49	
Dr Cap. cr. accts. rec. Income tax Corporation prior years		3,562.07
Dr - Capital Cr. Bills payable - Overholt a/c prior years		20,000.00
Dr - Capital Cr - Depr. Reserve		1,739.49
Capital reduced 1920	7,391.10	
	37,669.76	37,669.76

Note - Prior year changes taken from former report Examining Officer's on A. Overholt & Co., dated Feb. 2, 1921.

fo

Mr. Eustace:

Defendant offers in evidence certified photostatic copy of appeal submitted by A. W. Mellon, Pittsburgh, Pennsylvania, executed January 20, 1923, which is in protest of the determination of the Commissioner as evidenced by Bureau letters heretofore admitted in evidence; this exhibit being identified as Defendant's Exhibit "M".

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "M".
(Page 452 a.)

[redacted]

1/20/23

IN THE TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

IN THE MATTER OF ADDITIONAL INCOME TAXES PROPOSED TO BE ASSESSED FOR THE TAXABLE YEARS 1919 AND 1920.

APPEAL OF A. W. MELLON, of PITTSBURGH, PENNA.

AND NOW, January 19, 1923, comes A. W. MELLON, and appeals from the action of the Income Tax Unit in proposing to assess against him additional income taxes for the years 1919 and 1920, as stated in Treasury Department letter dated December 22, 1922, reference IT:SA:As-CCG.

The exceptions upon which this appeal is based are as follows:

FIRST. The Income Tax Unit erroneously reduced the value of the good will of A. Overholt & Company as of March 1, 1913 to $435,575.00.

SECOND. The Income Tax Unit failed to allow A. Overholt & Company a good will value of $1,640,557.90 as of March 1, 1913.

THIRD. The determination and allowance as of March 1, 1913 of a good will value of A. Overholt & Company at $1,640,557.90 would eliminate any additional tax liability against appellant for the years 1919 and 1920.

The facts upon which the foregoing exceptions are based are as set forth in the appeal this day filed in behalf of A. Overholt & Company, as shown by photostatic copies of the

appeal and the brief in support thereof which are attached hereto, made a part hereof and marked Exhibits "A" and "B."

For the reasons as set forth in the appeal filed in behalf of A. Overholt & Company, exceptions have been taken as stated herein, to the findings of the Income Tax Unit as set forth in Treasury Department letter dated December 29, 1922. An appeal therefrom is made to the Commissioner of Internal Revenue as provided in said letter.

Appellant avers that this appeal is not taken or interposed for the purpose of delaying the final determination of the correct tax liability.

WHEREFORE, your appellant respectfully submits that a proper determination of the value as of March 1, 1913 of the good will of A. Overholt & Company will disclose no additional tax liability upon his part for the years 1919 and 1920.

Appellant requests that he be given an opportunity for an oral hearing.

Respectfully submitted,

E. D. Millen

W. A. SRIVERT
Attorney for Appellant
747 Union Arcade
PITTSBURGH, PA.

12

DISTRICT OF COLUMBIA) SS:

Before me, a Notary Public duly authorized thereto, personally appeared A. W. MELLON, who, being duly sworn according to law, deposes and says that the statements set forth in the foregoing appeal are true and correct, as he verily believes, and that said appeal is not taken for the purpose of delaying the final determination of appellant's correct tax liability.

A. W. Mellon

SWORN to and subscribed before me this 20th day of January, A. D. 1923.

Notary Public.

My commission expires: Sept 21 1925

a3

Defendant's "T" 10/29/34 .T.

IN THE TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

IN THE MATTER OF ADDITIONAL INCOME AND PROFITS TAXES PROPOSED TO BE ASSESSED AGAINST A. OVERHOLT & COMPANY FOR THE TAXABLE YEARS 1916, 1917 AND 1918.

APPEAL OF A. OVERHOLT & COMPANY, OF PITTSBURGH, PENNA.

AND NOW, January 19, 1923, comes A. OVERHOLT & COMPANY, and appeals from the action of the Income Tax Unit in proposing to assess against it additional income and profits taxes for the years 1916, 1917 and 1918, as stated in Treasury Department letter dated December 22, 1922, reference IT:SA:As-CCG.

The exceptions upon which this appeal is based are as follows:

FIRST. The Income Tax Unit erroneously reduced the value of the good will of A. Overholt & Company as of March 1, 1913 to $435,575.00.

SECOND. The Income Tax Unit failed to allow A. Overholt & Company a good will value of $1,640,557.90 as of March 1, 1913.

THIRD. The determination and allowance as of March 1, 1913 of a good will value of A. Overholt & Company at $1,640,557.90 will eliminate any additional tax liability against appellant for the year 1918.

The facts upon which the foregoing exceptions are based

are as set forth in the brief this day filed in behalf of A. Overholt & Company accompanying this appeal.

For the reasons as set forth in this appeal, exceptions are taken as stated herein to the findings of the Income Tax Unit as set forth in Treasury Department letter dated December 22, 1922.

Appellant avers that this appeal is not taken or intended for the purpose of delaying the final determination of its correct tax liability.

WHEREFORE, your appellant respectfully submits that a proper determination of the value as of March 1, 1913 of the good will of this Company will disclose no additional tax liability upon its part for the year 1918.

Appellant requests that it be given an opportunity for an oral hearing.

Respectfully submitted,

A. OVERHOLT & COMPANY

By A. J. Hicks
President

W. A. SEIFERT
Attorney for Appellant
747 Union Arcade
PITTSBURGH, PA.

a5

STATE OF PENNSYLVANIA,)
) ss:
County of Allegheny.)

Before me, a Notary Public duly authorized thereto, personally appeared D. J. HICKS, who, being duly sworn according to law, deposes and says that the statements set forth in the foregoing appeal are true and correct, as he verily believes, and that the said appeal is not taken for the purpose of delaying the final determination of appellant's correct tax liability.

D. J. Hicks

SWORN to and subscribed before me this 17th day of January, A. D. 1923.

Wm J. Shillibeer
Notary Public.

My commission expires: Feb. 21, 1923.

a6

BEFORE THE TREASURY DEPARTMENT

IN RE: ...

of

...

...

...

On the basis of this report, the Bureau of Internal Revenue questioned the allowance of a deduction on account of obsolescence of good will. Internal Revenue Agent A. W. Smith, in a supplementary report, dated November 8, 1921, arrived at a computation of the good will value, as at March 1, 1913, of $1,600,000.00. Accordingly the Revenue Agent recommended that the corporation be allowed, for the year 1918, a deduction from income, amounting to $925,823.73, on account of obsolescence of good will. This adjustment, with the revision of another item, changed the amount of the additional tax for 1918 to $7,177.13.

Under date of December 22, 1922, the Department issued an assessment letter covering the years 1916, 1917 and 1918. This letter agreed with the examining officer's report, except as to the deduction on account of loss due to obsolescence of good will.

The audit contends that the March 1, 1913, value of the [illegible] is $435,575.00 instead of $1,600,000.00, as claimed, as follows:

1913	$[illegible],886.10
1919	[illegible],431.20
1920	[illegible],257.70
	$435,575.00

[illegible] is properly allowable as a deduction [illegible]. [illegible], however, does not agree with the amount established [illegible], namely, $435,575.00, as the value of the good will on March 1, 1913. The [illegible] to the [illegible] with the allowance of the deduction of the obsolescence of good will over the period January 31, 1918 to February 1, 1920, and makes no computation thereto, feeling that this portion of the computation is in accordance with the principle and rule laid down by the Advisory Tax Board in T. D. 44, Cumulative Bulletin #1, page 133.

VALUE OF GOOD WILL OF A. OVERHOLT & COMPANY AS AT MARCH 1, 1913

Before going into the relative merits of the method and percentages used by the Bureau in establishing the value of the good will at $435,575.00, and the method used by the corporation in arriving at the value as at that date, attention is directed to an oversight on the

part of the Unit in the computation of taxes outlined in the Bureau's letter dated January 3, 1923.

In establishing the value of the good will as at March 1, 1913, the Bureau uses as net tangible assets for the three years, 1910, 1911 and 1912, the following amounts:

Net Tangible Assets:

December 31, 1910	$1,737,485.85
December 31, 1911	2,048,007.39
December 31, 1912	2,294,188.76
Average Net Tangible Assets	$2,026,560.70

These figures appear to be in error for the records and papers in the case disclose the following amounts as Net Tangible Assets at the beginning of the respective years:

December 31, 1909	$1,411,328.57
December 31, 1910	1,737,485.85
December 31, 1911	2,048,007.39
Average Net Tangible Assets	$1,732,273.94

There are differences of opinion as to the percentages to be used, depending upon local conditions, time, and rates of interest considered as a fair return to capital and the earnings in excess of such fair return to capital are of necessity attributable to an intangible asset, namely, goodwill, the amount of which is obtained by capitalizing the excess earnings at a certain percentage.

Therefore, in order to apply this economic principle correctly, it is necessary to use the net tangible assets which were on hand at the beginning of the year, for, these are the assets which earn the income for that particular year. The Unit, in applying this principle, has used the net tangible assets on hand at the close of the year, which amount necessarily included the income for the entire year. This manner of computing the average net tangible assets is not in accordance with the Income Tax procedure. There is no doubt that the Unit will agree to use the net tangible assets as shown by the balance sheets at the beginning of the year instead of the net tangible assets at the close of the year.

In this particular case, assuming that everything else is correct (but this is not conceded by the corporation), this point alone establishes a difference in favor of the taxpayer of approximately

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$200,000.00 in the value of the good will as at March 1, 1915.

In order to present the case fully and intelligently, the following additional information is submitted:

HISTORY OF THE COMPANY

In 1910, Graham Overholt established The Overholt Distillery [illegible], Pennsylvania. This distillery was operated by the [illegible] family, and [illegible] portions of the [illegible] were [illegible] gallons.

In 1920, [illegible] Prohibition [illegible] the manufacture of [illegible] whiskey, [illegible] were [illegible] at Penn [illegible], [illegible], [illegible] Overholt, [illegible] established [illegible] since [illegible] 1927.

[illegible] gallons

[illegible] March 1, 1915
Value of Good Will

[illegible] attention is respectfully directed to [illegible]

A10

6, as outlined in A. R. M. 34. In establishing the March 1, 1913,

value of good will, the Committee states:

> "In view of the hazards of the business, the changes in popular tastes, and the difficulties of preventing imitation or counterfeiting of popular brands effecting the sales of the genuine goods, the Committee is of the opinion that the figure given of 20 per cent return on intangibles is no more than reasonable, and it recommends that no higher figures than that be attached in any case of intangibles without a very clear and adequate showing that the value of the intangibles was in fact greater than will be measured by the 'law of the formula.'

[illegible]

"Goodwill is the monetary value placed upon the favorable reputation of a mercantile or manufacturing concern, and discounts the value of the turnover of a business in consequence of the probabilities of the old customers continuing."

a/1

Lord Justice Lindley, in an English case, stated in part that "* * * * I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers. * * * *."

As stated before, A. Overholt and Company's product was known throughout the entire United States as a very superior brand of rye whiskey, and was sold by practically all of the prominent wholesale and retail liquor dealers. The concern had a large list of old customers who had purchased their product for years, and whose patronage could be reasonably expected to continue. The fact that the business was over one hundred years old and still in existence is good proof that a trade name and good will value attached to the business. However, the fact that the company's business continually increased during its entire existence is conclusive proof that a substantial good will value had been established.

The percentage, therefore, at which the corporation has capitalized its good will value is 10 per cent, and it is felt that good will could not be sold to an investor purchasing the business at this figure.

While the Committee, in ... ... * * *, has suggested 15 per cent as a reasonable percentage, it should be borne in mind, that the use of a smaller percentage is not eliminated in cases where such a figure is warranted, especially so in this case where local advantages, favorable trade, credit and exchange conditions existed in the territory of this corporation at the time, i. e., March 1, 1913.

The value of the goodwill of ... Overholt and Company has been computed on the basis of the formula and rules laid down by the Committee in ... T. B. 54, and adopted by the Bureau in arriving at the value of $[illegible],775.00 in the assessment letter addressed to the taxpayer.

The figures used are the same with the exception of the net tangible assets which were used as at the beginning of the respective taxable years, i. e., as at December 31, 1909, 1910 and 1911, respectively.

a12

COMPUTATION OF THE VALUE OF GOOD WILL
AS AT MARCH 1, 1913

NET INCOME:

Year ended December 31, 1910	$348,274.37
Year ended December 31, 1911	324,474.50
Year ended December 31, 1912	331,227.83
Average Net Income	$267,992.23

NET TANGIBLE ASSETS:

[illegible] December 31, 1909	[illegible]
[illegible] December 31, 1910	[illegible]
[illegible] December 31, 1911	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]

fully realizing the correctness of this statement, the
[illegible] obtained the affidavits (such as would be acceptable
[illegible] number of wholesale and retail liquor dealers and
[illegible] well acquainted with the product manufactured by
[illegible] Company, and well qualified to establish the value of
[illegible] March 1, 1913. Those affidavits are
[illegible] presented to the Bureau as additional evidence
[illegible] the case.

[illegible] January,

D. C. Hicks

Sworn to and subscribed before me this 11th day of January,
A. D. 1923.

Wm J Phillips
Notary Public.

My commission expires: Feb. 25, 1923

a14

Mr. Eustace:

Defendant offers in evidence certified copy of appeal of R. B. Mellon, Pittsburgh, Pennsylvania, executed January 19, 1923, being to the same effect as Defendant's Exhibit "M" in the other case; this being marked Defendant's Exhibit "N".

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is identical in language to Defendant's Exhibit "M", except as to the first three pages of Exhibit "N", which are in words and figures as follows:

Defendant's Exhibit "N".

IN THE TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

IN THE MATTER OF ADDITIONAL INCOME TAXES PROPOSED TO BE ASSESSED FOR THE TAXABLE YEARS 1919 and 1920

APPEAL OF R. B. MELLON, OF PITTSBURGH, PENNA.

AND Now, January 19, 1923, comes R. B. Mellon, and appeals from the action of the Income Tax Unit in proposing to assess against him additional income taxes for the years 1919 and 1920, as stated in Treasury Department letter dated December 22, 1922, reference IT:SA:As-CCG.

The exceptions upon which this appeal is based are as follows:

FIRST. The Income Tax Unit erroneously reduced the value of the good will of A. Overholt & Company as of March 1, 1913 to $435,575.00.

SECOND. The Income Tax Unit failed to allow A. Overholt & Company a good will value of $1,640,577.90 as of March 1, 1913.

THIRD. The determination and allowance as of March 1, 1913 of a good will value of A. Overholt & Company at $1,640,557.90 would eliminate any additional tax liability against appellant for the years 1919 and 1920.

The facts upon which the foregoing exceptions are based are as set forth in the appeal this day filed in behalf of A. Overholt & Company, as shown by photostatic copies of the appeal and the brief in support thereof which are attached hereto, made a part hereof and marked Exhibits "A" and "B".

For the reasons as set forth in the appeal filed in behalf of A. Overholt & Company, exceptions have been taken as stated herein, to the findings of the Income Tax Unit as set forth in Treasury Department letter dated December 22, 1922. An appeal therefrom is made to the Commissioner of Internal Revenue as provided in said letter.

Appellant avers that this appeal is not taken or interposed for the purpose of delaying the final determination of his correct tax liability.

WHEREFORE, your appellant respectfully submits that a proper determination of the value as of March 1, 1913 of the good will of A. Overholt & Company will disclose no additional tax liability upon his part for the years 1919 and 1920.

Appellant requests that he be given an opportunity for an oral hearing.

Respectfully submitted,

(Signed) R. B. MELLON.

W. A. SEIFERT,
Attorney for Appellant
747 Union Arcade
Pittsburgh, Pa.

State of Pennsylvania,
County of Allegheny. } ss.:

Before me, a Notary Public duly authorized thereto, personally appeared R. B. MELLON, who, being duly sworn according to law, deposes and says that the statements set forth in the foregoing appeal are true and correct, as he verily believes, and that said appeal is not taken for the purpose of delaying the final determination of appellant's correct tax liability.

(Signed) R. B. MELLON.

SWORN to and subscribed before me this 19th day of January, A. D. 1923.

(Signed) WM. S. PHILLIPS,
Notary Public.

My commission expires:
(SEAL)

Mr. Eustace:

At this time defendant offers in evidence certified photostatic copy of protest to Commissioner of Internal Revenue submitted by W. A. Seifert, attorney for Andrew W. Mellon, executed January 29, 1927, with reference to the income tax of plaintiff for the year 1920, marked for identification Defendant's Exhibit "O".

Mr. Booth:

What is the purpose?

Mr. Eustace:

I might state at this time the purpose of all of these protests which have been offered and received in evidence, and the only purpose, is to show that plaintiff first asserted a claim that said income should be treated as the income of a taxable trust long after the filing of the plaintiff's claim for refund, and filed for no other purpose.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence bearing file mark of January 31, 1927, is in words and figures as follows:

Defendant's Exhibit "O".

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE
Washington, D. C.

In the Matter
of
The audit of the Income Tax Return filed by HONORABLE ANDREW W. MELLON, Woodland Road, Pittsburgh, Pennsylvania, for the Calendar Years 1919 and 1920.

PROTEST
IT:PA:PYA:ARM

HONORABLE D. H. BLAIR, *Commissioner of Internal Revenue, Washington, D. C.*

Reference is made to letter from your office dated December 16, 1926, addressed to Honorable Andrew W. Mellon and bearing the above Bureau's symbols, showing a deficiency in tax for the years 1919 and 1920 amounting to $390,267.95. It is noted that ten days' time from the date of your letter, December 16, 1926, has been granted in which to file a Protest. On January 12, 1927, an extension to January 31, 1927, was granted within which to file said Protest.

The taxpayer protests the error on the part of the Commissioner of Internal Revenue in refusing to allow as a deduction for the year 1919 the contribution of

$1,350.00 made to the Citizens Committee on the City Plan of Pittsburgh.

The taxpayer protests the error on the part of the Commissioner of Internal Revenue in refusing to allow as a deduction for the year 1920 the contribution of $7,400.00 made to the Citizens Committee on the City Plan of Pittsburgh.

The taxpayer also desires to protest the error on the part of the Commissioner of Internal Revenue in refusing to allow as a deduction from his taxable income for the years 1919 and 1920, respectively, his aliquot part of the value of the goodwill, trade marks, trade names, etc., of A. Overholt & Company, a corporation of the State of Pennsylvania, which goodwill, trade marks, trade names, etc., had a value on March 1, 1913, of $1,364,330.20.

It is respectfully requested that a conference be granted the taxpayer, or his representative, before the Income Tax Unit, at which conference a Memorandum Brief will be filed in support of the taxpayer's contentions.

This Protest is not filed for the purpose of delay.

Respectfully submitted,

(Signed) W. A. SEIFERT,
Attorney for Andrew W. Mellon.

State of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for the said County and State, personally appeared W. A. SEIFERT, who says that he is Attorney for Andrew W. Mellon, taxpayer above named, that he has read the foregoing Protest and that the facts therein stated are true and correct in so far as the same are within his own knowledge and in so far as the same are derived from information from others he believes them to be true.

(Signed) W. A. SEIFERT.

SWORN to and subscribed before me this 29th day of January, A. D. 1927.

(Signed) M. V. ANDREWS
(SEAL)

My commission expires:

M. V. ANDREWS,
Notary Public.

My commission expires January 20th, 1929.

Mr. Eustace:

Defendant also offers in evidence Defendant's Exhibit "P", being a certified photostatic copy of a similar protest filed on behalf of R. B. Mellon.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence bearing file mark of January 31, 1927, is in words and figures as follows:

Defendant's Exhibit "P".

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE
Washington, D. C.

In the Matter
of
The audit of the Income Tax Return filed by RICHARD B. MELLON, 514 Smithfield Street, Pittsburgh, Pennsylvania, for the calendar years 1919 and 1920.

PROTEST
IT:PA:PYA:ARM

HONORABLE D. H. BLAIR, *Commissioner of Internal Revenue, Washington, D. C.*

Reference is made to letter from your office dated December 16, 1926, addressed to Mr. Richard B. Mellon and bearing the above Bureau's symbols, showing a deficiency in tax for the years 1919 and 1920, amounting to $341,656.37. It is noted that ten days' time from the date of your letter, December 16, 1926, has been granted within which to file a Protest. On January 12, 1927, an extension to Jannary 31, 1927, was granted within which to file said Protest.

The taxpayer protests the error on the part of the Commissioner of Internal Revenue in refusing to allow as a deduction for the year 1920 the contribution

of $8,400.00 made to the Citizens Committee on City Plan of Pittsburgh.

The taxpayer also desires to protest the error on the part of the Commissioner of Internal Revenue in refusing to allow as a deduction from his taxable income for the years 1919 and 1920, respectively, his aliquot part of the value of goodwill, trade marks, trade names, etc., of A. Overholt & Company, a corporation of the State of Pennsylvania, which goodwill, trade marks, trade names, etc., had a value on March 1, 1913, of $1,364,330.20.

It is respectfully requested that a conference be granted the taxpayer, or his representative, before the Income Tax Unit, at which conference a Memorandum Brief will be filed in support of the taxpayer's contentions.

This Protest is not filed for the purpose of delay.

(Signed) W. A. SEIFERT,
Attorney for Richard B. Mellon.

State of Pennsylvania,
County of Allegheny. } ss.:

Before me, the undersigned authority, a Notary Public in and for the said County and State, personally appeared W. A. SEIFERT, who says that he is Attorney for Richard B. Mellon, taxpayer above named, that he has read the foregoing Protest and that the facts therein stated are true and correct in so far as

the same are within his own knowledge and in so far as the same are derived from information from others he believes them to be true.

(Signed) W. A. SEIFERT.

SWORN to and subscribed before me this 29th day of January, A. D. 1927.

(Signed) M. V. ANDREWS,
(SEAL)

My commission expires:

M. V. ANDREWS,
Notary Public.

My commission expires January 20th, 1929.

Mr. Eustace:

Defendant offers in evidence a certified photostatic copy of a memorandum brief submitted by W. A. Seifert, attorney for A. W. Mellon, addressed to the Commissioner of Internal Revenue, in support of the protest which has just been offered in evidence; the same being marked Defendant's Exhibit "Q".

Mr. Booth:

For the same purpose?

Mr. Eustace:

It is offered for the same purpose.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence, bearing file mark of February 14, 1927, is in words and figures as follows:

Defendant's Exhibit "Q".

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE
Washington, D. C.

In the Matter of The audit of the Income Tax Returns filed by HONORABLE ANDREW W. MELLON, Woodland Road, Pittsburgh, Pennsylvania, for the calendar years 1919 and 1920.	IT:PA:PYA:ARM Dated, December 16 1926.

MEMORANDUM BRIEF

HONORABLE D. H. BLAIR,
Commissioner of Internal Revenue,
Washington, D. C.

Reference is made to a deficiency letter from your office dated December 16, 1926, showing an alleged deficiency in tax for the years 1919 and 1920, amounting to $390,267.95.

The question here at issue is:

The Commissioner of Internal Revenue erroneously disallowed as deductions from gross income in the years 1919 and 1920, the amounts of $1350.00 and $7400.00, respectively, representing donations to the Citizens Committee On City Plan of Pittsburgh.

Section 214 (a) of the Revenue Act of 1918, provides:

"That in computing net income there shall be allowed as deductions:

(11) Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act, to an amount not in excess of 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. * * *"

Section 1 of the Revenue Act of 1918 provides, in part, as follows:

"That when used in this Act—

The term 'corporation' *includes associations,* joint-stock companies, and insurance companies." (Italics ours.)

Section 231 of the Revenue Act of 1918 provides, in part as follows:

"That the following organizations shall be exempt from taxation under this title:

(6) Corporations organized and operated exclusively for religious, charitable, scientific, or ed-

ucational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual."

The Citizens Committee on City Plan of Pittsburgh was organized prior to the year 1919 as an association for the purpose of promoting the orderly and efficient development of municipalities; promoting the adoption of scientific methods of city and municipal planning; acquiring constructive publicity in matters pertaining to municipal planning problems and their solution; collecting, classifying, analyzing, correlating, interpreting and publishing facts with reference to municipal planning needs, methods and benefits; and preparing and publishing for free distribution scientific model municipal studies and plans.

On or about October 26, 1920, the association known as "Citizens Committee on City Plan of Pittsburgh" was incorporated under the name of "Municipal Planning Association" and since that time has been functioning under that name.

In the year 1919, the taxpayer made the following donations to the association:

May 27th	$ 250.00
September 9th	500.00
November 25th	600.00
Total	$1350.00

In the year 1920, the taxpayer made the following donations to the association:

February 24th	$ 600.00
May 22nd	600.00
August 19th	600.00
November 17th	600.00
December 31st	5000.00
Total	$7400.00

Under date of December 20, 1926, the Commissioner of Internal Revenue issued a decision addressed to the Municipal Planning Association in which it was stated that said corporation was not subject to tax and need not file returns as the purposes and activities of said corporation brought it within the provisions of Section 231 (6) of the Revenue Act of 1918 and corresponding sections of subsequent Acts. A copy of this decision is annexed hereto and marked Exhibit A.

It is respectfully submitted that the income of the taxpayer for the year 1919 as found by the Commissioner should be reduced by the amount of $1350.00 and that the income for the year 1920 as found by the Commissioner should be reduced by the amount of $7400.00.

If the Income Tax Unit determines that these items are not deductible, it is respectfully requested that a conference be arranged at which time the taxpayer will be represented by counsel.

This brief is not filed for the purpose of delay.

Respectfully submitted,

(Signed) W. A. SEIFERT,
Attorney for A. W. Mellon.

AFFIDAVIT.

State of Pennsylvania,
County of Allegheny. } ss.:

H. M. JOHNSON, being duly sworn according to law, deposes and says that he is the taxpayer's private secretary and duly authorized agent, and that he has read the statements contained in the foregoing brief and that said statements are true and correct as he verily believes.

(Signed) H. M. JOHNSON.

Sworn to and subscribed before me this 11th day of February, A. D. 1927.

(Signed) M. V. ANDREWS,
Notary Public.

(SEAL)

My Commission expires January 20th, 1929.

Mr. Eustace:

Also, Defendant's Exhibit "R", being a certified photostatic copy of a similar brief submitted with the protest in behalf of R. B. Mellon.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence, bearing file mark of February 14, 1927, is in words and figures as follows:

Defendant's Exhibit "R".

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE
Washington, D. C.

In the Matter of The audit of the income tax returns filed by RICHARD B. MELLON, 514 Smithfield Street, Pittsburgh, Pennsylvania, for the calendar years 1919 and 1920.	IT:PA:PYA:ARM Dated, December 16 1926.

MEMORANDUM BRIEF

HONORABLE D. H. BLAIR,
Commissioner of Internal Revenue,
Washington, D. C.

Reference is made to a deficiency letter from your office dated December 16, 1926, showing an alleged deficiency in tax for the years 1919 and 1920, amounting to $341,656.37.

The question here at issue is:

The Commissioner of Internal Revenue erroneously disallowed as deductions from gross income in the years 1919 and 1920, the amounts of $600.00 and $8400.00, respectively, representing donations to the Citizens Committee on City Plan of Pittsburgh.

Section 214 (a) of the Revenue Act of 1918, provides:

"That in computing net income there shall be allowed as deductions:

(11) Contributions or gifts made within the taxable year to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act, to an amount not in excess of 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary.

* * *"

Section 1 of the Revenue Act of 1918 provides, in part, as follows:

"That when used in this Act—

The term 'corporation' *includes associations*, joint-stock companies, and insurance companies." (Italics ours.)

Section 231 of the Revenue Act of 1918 provides, in part, as follows:

"That the following organizations shall be exempt from taxation under this title:

(6) Corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual."

The Citizens Committee on City Plan of Pittsburgh was organized prior to the year 1919 as an association for the purpose of promoting the orderly and efficient development of municipalities; promoting the adoption of scientific methods of city and municipal planning; acquiring constructive publicity in matters pertaining to municipal planning problems and their solution; collecting, classifying, analyzing, correlating, interpreting and publishing facts with reference to municipal planning needs, methods and benefits; and preparing and publishing for free distribution scientific model municipal studies and plans.

On or about October 26, 1920, the association known as "Citizens Committee on City Plan of Pittsburgh" was incorporated under the name of "Municipal Planning Association" and since that time has been functioning under that name.

In the year 1919, the taxpayer made the following donation to the association:

December 5th $600.00

In the year 1920, the taxpayer made the following donations to the association:

February 27th	$ 600.00
June 25th	600.00
September 7th	600.00
September 28th	1600,00
December 31st	5000.00
Total	$8400.00

Under date of December 20, 1926, the Commissioner of Internal Revenue issued a decision addressed to the Municipal Planning Association in which it was stated that said corporation was not subject to tax and need not file returns as the purposes and activities of said corporation brought it within the provisions of Section 231 (6) of the Revenue Act of 1918 and corresponding sections of subsequent Acts. A copy of this decision is annexed hereto and marked Exhibit A.

It is respectfully submitted that the income of the taxpayer for the year 1919 as found by the Commissioner should be reduced by the amount of $600.00 and that the income for the year 1920 as found by the Commissioner should be reduced by the amount of $8400.00.

If the Income Tax Unit determines that these items are not deductible, it is respectfully requested that a conference be arranged at which time the taxpayer will be represented by counsel.

This brief is not filed for the purpose of delay.

Respectfully submitted,

(Signed) W. A. SEIFERT,
Attorney for R. B. Mellon.

AFFIDAVIT

State of Pennsylvania,
County of Allegheny. } ss.:

D. J. Hicks, being duly sworn according to law, deposes and says that he is the taxpayer's private secretary and duly authorized agent, and that he has read the statements contained in the foregoing brief and that said statements are true and correct as he verily believes.

(Signed) D. J. Hicks.

Sworn to and subscribed before me this 11th day of February, A. D. 1927.

(Signed) M. V. Andrews,
(seal) *Notary Public.*

My Commission expires January 20th, 1929.

Mr. Eustace:

Counsel for plaintiffs will admit that waivers were filed by both A. W. Mellon and R. B. Mellon extending the time for the assessment and collection of tax for the year 1920 to December 31, 1927.

Mr. Booth:

We object to the introduction of it, on the ground of materiality, it is immaterial; the question is not involved whether the tax was barred by the statute of limitations.

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The Court:

We will admit it for the present, at any rate, and overrule your objection and note an exception.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "S", being certified photostatic copy of waiver of right to file petition to the United States Board of Tax Appeals, filed by A. W. Mellon for 1919 and 1920. That is offered for the purpose of supporting the denial of the allegation that the taxes were paid under protest.

Mr. Booth:

Well, that is entirely immaterial; since the Act of 1924 it doesn't have to be paid under protest, and we don't care whether they are paid under protest.

Mr. Eustace:

And also on the question of the change of basis.

Mr. Booth:

Objected to, on the ground it is immaterial and irrelevant.

The Court:

We will overrule the objection and note you an exception.

Which said Exhibit "S" so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "S".

Feb. 21, 1927

WAIVER OF RIGHT TO FILE A PETITION WITH THE U. S. BOARD OF TAX APPEALS

The undersigned taxpayer hereby waives the right to file a petition with the U. S. Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926 and consents to the assessment and collection of a deficiency in tax for the years 1919 and 1920 aggregating $384,580.45, without prejudice to the right of the taxpayer to file claim for refund of all or part of said deficiency.

(signed) A. W. MELLON
By (signed) H. M. JOHNSON,
Agent.

Woodland Road,
Pgh. Pa.

Date 3/9/27 By

NOTE. —This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 1106 of the Revenue Act of 1926.

Mr. Booth:

Plaintiffs admit that the additional tax of $175,259.70, plus interest in the amount of $12,527.47 was assessed against plaintiff Richard B. Mellon by the Commissioner of Internal Revenue on May 5, 1927; and a similar assessment in the amount of $190,419.70, plus interest of $12,082.52, was assessed by the Com-

missioner against plaintiff A. W. Mellon on March 19, 1927.

———

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "T" being certified photostatic copy of a letter dated April 16, 1932, from the Commissioner of Internal Revenue to A. W. Mellon, which is the continuation letter with those attached to the claim for refund, which were admitted in the beginning of the testimony.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "T".

April 16, 1932.

Hon. A. W. MELLON,
Woodland Road,
Pittsburgh, Pennsylvania.

Sir:

Your claim for refund of $194,160.75, individual income tax for the taxable year 1920, has been examined and will be rejected for the following reason:

Your claim is based on the statement that amounts of $281,779.95 and $52,814.28 were included in taxable income representing operating profits of A. Overholt Company and West Overton Distilling Company, respectively, and since the partnerships were in liquidation, the profits were not reportable until 1925 when final liquidation occurred.

You are advised that it is held that the operating income and the operating loss of the above named partnerships are reportable in the year in which the income was realized or the loss sustained.

If you do not acquiesce in the proposed action relative to your claim and desire a hearing in the Income Tax Unit at Washington, such hearing will be granted if written request is made therefor within thirty days from the date of this letter.

If a hearing is not requested the rejection will be officially scheduled at the expiration of the period indicated.

A copy of this letter is being forwarded to your representative, Mr. William A. Seifert, in accordance with the authority conferred upon him in your power of attorney on file with the Bureau.

Respectfully,

J. C. WILMER,
Deputy Commissioner.
By (Signed)
Head of Division.

Mr. Eustace:

At this time defendant offers in evidence Defendant's Exhibit "U", being a certified photostatic copy of a letter from the Commissioner of Internal Revenue to Mr. R. B. Melfon, dated April 16, 1932.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "U".

April 16, 1932.

Mr. R. B. MELLON,
6500 Fifth Avenue,
Pittsburgh, Pennsylvania.

Sir:

Your claim for refund of $187,878.17, individual income tax for the year 1920, has been examined and will be rejected for the following reasons:

Your claim is based on the statement that amounts of $281,779.95 and $52,814.28 were included in taxable income representing operating profits of A. Overholt Company and West Overton Distilling Company, respectively, and since the partnerships were in liquidation, the profits were not reportable until 1925 when the final liquidation occurred.

You are advised that it is held that the operating income and the operating losses of the above-mentioned partnerships are reportable in the year in which income was realized or the loss was sustained.

If you do not acquiesce in the proposed action relative to your claim and desire a hearing in the Income Tax Unit at Washington, such hearing will be granted if written request is made therefor within thirty days from the date of this letter.

If a hearing is not requested the rejection will be officially scheduled at the expiration of the period indicated.

A copy of this letter is being forwarded to your representative, Mr. William A. Seifert, in accordance with the authority conferred upon him in your power of attorney on file with the Bureau.

Respectfully,

J. C. WILMER,
Deputy Commissioner.
By (Signed)
Head of Division.

Mr. Eustace:

Defendant offers Defendant's Exhibit "V", being certified photostatic copy of letter dated April 6, 1934, addressed to the Estate of R. B. Mellon, and relating to the tax of R. B. Mellon for the year 1920.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

SELLER'S COPY.

Vol. III

TRANSCRIPT OF RECORD

Ret 166

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937 25774 XXXC

No. 144

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

PAUL MELLON, DAVID K. E. BRUCE, AND DONALD D. SHEPARD, EXECUTORS OF THE ESTATE OF A. W. MELLON, DECEASED

No. 145

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED JUNE 15, 1937

CERTIORARI GRANTED OCTOBER 11, 1937

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Defendant's Exhibit "V".

April 6, 1934.

Estate of R. B. Mellon,
6500 Fifth Avenue,
Pittsburgh, Pennsylvania.

In re: Refund claim for year 1920
Amount $187,787.17

Sirs:

Reference is made to Bureau letter dated Feb. 27, 1934 wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.

You are hereby notified that the claim was disallowed on a schedule dated Apr. 6, 1934. This notification is being mailed to you by registered mail and constitutes notice of the disallowance of the claim in accordance with the provisions of Section 3226, Revised Statutes as amended, and as further amended by Section 1103 of the Revenue Act of 1932.

By direction of the Commissioner:

Respectfully,

Chas. T. Russell,
Deputy Commissioner.

By: (Signed) T. F. Langley,
Head of Division.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "W", being a certified photostatic copy of letter dated February 27, 1934, addressed to the Estate of R. B. Mellon, from the Commissioner of Internal Revenue, being the letter denying the refund claim for 1920.

Mr. Booth:

Object to this, for the same reason that the similar exhibit in regard to A. W. Mellon was objected to. The final rejection letter is Exhibit "V", and this Exhibit "W" is a self-serving declaration and therefore immaterial.

The Court:

We will overrule the objection and note an exception.

Which said Exhibit "W" so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "W".

Feb. 27, 1934.

Estate of R. B. Mellon,
6500 Fifth Avenue,
Pittsburgh, Pennsylvania.

Sirs:

The claim for refund of $187,787.17, income taxes for the year 1920 filed by Mr. R. B. Mellon, has been examined.

The Claim is based on the statement that amounts of $281,779.95 and $52,814.28 were included in taxable

income representing operating profits of A. Overholt and Company and the West Overton Distilling Company, respectively, and that since the partnerships were in liquidation the profits were not reportable until the year 1925 when final liquidation occurred.

Careful consideration has been accorded the information submitted in the brief dated October 11, 1932 and at a conference held in Washington, D. C., October 12, 1932 and this office holds that Mr. Mellon's proportionate share of the operating profits of the above-mentioned partnerships was properly reportable in his 1920 return.

Accordingly, the claim will be disallowed. In accordance with section 1103 (a) of the Revenue Act of 1932, official notice of the disallowance of the claim will be issued by registered mail.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.

By (Signed) H. B. ROBINSON,
Head of Division.

Mr. Booth:

Plaintiffs admit that the Commissioner's final audit of income tax return of plaintiff A. W. Mellon for the year 1924 showed an overassessment in the said year in the amount of $16,982.12, and that in determining said overassessment Commissioner did not

eliminate from plaintiff's income tax return the amount of $8,202.09 reported therein as plaintiff's distributive share of the income of A. Overholt & Company, and did not eliminate therefrom an amount of $7,644.40 deducted on said return as plaintiff's proportionate share of as operative loss sustained by West Overton Distilling Company during the said year; and that said action of the Commissioner is set forth on his certificate of overassessment schedule of July 16, 1931.

The plaintiffs Executors of the Estate of R. B. Mellon admit that the Commissioner's final audit of R. B. Mellon's income tax for the year 1924 showed an overassessment for said year in the amount of $14,-778.35; and that in determining said overassessment the Commissioner did not eliminate from R. B. Mellon's income tax return an amount of $8,202.08 reported thereon as his distributive share of the income of "A. Overholt & Company, a partnership," and did not eliminate therefrom the amount of $7,644.40 deducted on his return as his proportionate share of an operating loss sustained by "West Overton Distilling Company, a partnership" during said year; and that the action of the Commissioner is set forth in his certificate of overassessment schedule of July 16, 1931.

Defendant's counsel thereupon offered in evidence, separately, each of the following duly certified photostatic copies of the original income tax returns of the persons named:

1. Individual income tax returns of A. W. Mellon for the calendar year 1925, marked Defendant's Exhibit "X."

2. Individual income tax return of Richard B. Mellon for the calendar year 1925, marked Defendant's Exhibit "Y."
3. Fiduciary return of income filed by The Union Trust Company of Pittsburgh as liquidating agent for A. Overholt & Company, a partnership, for 1925, marked Defendant's Exhibit "Z."
4. Fiduciary return of income, with schedules attached, filed by The Union Trust Company of Pittsburgh liquidating agent for West Overton Distilling Company, a partnership, for 1925, marked Defendant's Exhibit "AA."

To each of said offers plaintiffs' counsel expressly stated that they had no objection thereto.

That the full purport and substance of said Exhibits "X" and "Y" so offered and admitted in evidence is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "X".

(Page 485.)

Defendant's Exhibit "Y".

(Page 486.)

19.	Earned Net Income (not over $30,000)	19	16,470
20.	Less Personal Exemptions and Credit for Dependents	20	2,400
21.	Balance (Item 19 minus 20)	21	14,070
22.	Amount taxable at 1½% (not over the first $6,000 of Item 21)	22	6,000
23.	Amount taxable at 3% (not over the second $6,000 of Item 21)	23	6,000
24.	Amount taxable at 5% (balance over $30,000 of Item 21)	24	2,070
25.	Normal Tax (1½% of Item 22)	25	90
26.	Normal Tax (3% of Item 23)	26	180
27.	Normal Tax (5% of Item 24)	27	103 50
28.	Surtax on Items 19	28	
28a.	Tax on Earned Net Income (total of Items 25, 26, 27, and 28)	28a	
29.	Credit of 25% of Item 28a (not over 25% of Items 25, 41, 42, and 43)	29	76

Deductions (Other Than Interest)

10. Salaries and wages of employees (not including officers), reported on Line 2, and compensation for your own services
11. Interest (no interest included deduct to others)
12. Taxes on business and business property
13. Losses by fire, storm, etc. (explain in table provided [illegible])
14. Bad debts sustained (state other)
15. Depreciation, depletion, and depletion (explain in table provided [illegible])
16. Rent, repairs and other expenses (itemize below or on separate sheet)
17. Total (Lines 10 to 16, inclusive)
18. Total Deductions (Line 9 plus Line 17)
19. Net Profit (Line 1 minus Line 18) (Enter as Item 2)

Explanation of Deductions claimed on Lines 9 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. Kind of Property	2. Amount Received	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Explain in table on face of page)	6. Repairs	7. Other Expenses (Itemize below)	8. Net Profit (Enter as Item 5)

Explanation of deductions allowed on Schedule B

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Previously Allowed	5. Cost	6. Value as of March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter as Item 6)

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 7)

1. Kind of Property	2. Date Acquired	3. Date Sold	4. Amount Received	5. Depreciation Previously Allowed	6. Cost	7. Value as of March 1, 1913	8. Increase in Capital Net Gain

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. Obligations or Securities	2. Interest Received or Accrued	3. Amount Owned	4. Principal Amount Exempt From Taxation	5. Amount Owned in Excess of Exemptions	6. Interest on Amount in Excess of Exemptions (Enter as Item 4)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia			All	xxxxxx	xxxxxx
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended			All	xxxxxx	xxxxxx
(c) Liberty 3½% Bonds and other obligations of the United States issued on or before September 1, 1917			All	xxxxxx	xxxxxx
(d) Liberty 4% and 4½% Bonds, Treasury 4% and 4½% Bonds, Treasury Certificates of Indebtedness, and Treasury (1-year) Savings Certificates			$5,000		
(e) Liberty 4% and 4½% Bonds			$50,000		
(f) Treasury Notes			None		

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, AND 15

$18 Net Re-[illegible] and expenses, machinery items, etc.

14 Note A/C Mr. [illegible] Miller who died in February 1922 and left no assets.

15 See schedule attached.

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULE [illegible]

1. Kind of Property	2. Amt. Were Acquired	3. Probable Life After Acquired	4. Cost	5. [illegible]

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, ITEM 13

1. Kind of Property	[illegible]	[illegible]	[illegible]	[illegible]
1/2 Interest in brick building	Fire occurred [illegible]	[illegible]	[illegible]	[illegible]
Original Cost of Building [illegible]			See Rule 3 Paragraph	[illegible]

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1918 and any Regulations issued under authority thereof.

(If return is made by agent, executor, guardian, trustee, or receiver, add the word)

Sworn to and subscribed before me this 12th day of March, 1923

[illegible] Notary Public, D.C.

[illegible]

(Signature of officer administering oath)

(Title)

[illegible]

(Address of individual or agent)

SCHEDULE "B" - CAPITAL [illegible]

Item No.	Kind of Property	[illegible]			
1	Bonds,(Ward Bldg.)	[illegible]			
2	Stock, Ward Pfd.	[illegible]			
3	Stock, Ward Comm. A	[illegible]			
4	Stock, Ward Comm'B'	[illegible]			
* 5	Stock, Penn. Wtr.Pr	[illegible]			
6	Real Estate, Canton	[illegible]			
7	Stock, Pgh. Coal.	[illegible]			

THE ABOVE [illegible] JOINTLY BY ANDREW W. MELLON AND RICHARD B. MELLON

ANDREW W. MELLON'S [illegible]

* 8	A.[illegible] & Co.	[illegible]		
* 9	West [illegible]	[illegible]		
10	Real Estate -Marvin	[illegible]		
11	Real Estate -Rosslyn	[illegible]		
12	Real Estate [illegible]	[illegible]		

* See [illegible]

SCHEDULE "D" - CAPITAL NET GAIN. NAME SUCH OF ASSETS HELD MORE THAN TWO YEARS.

Item No.	Kind of Property.	Date Acquired.	Date Sold.	Amount Realized.	Improv. previously Allowed.	Cost.	Value 3/1/13.	Subsequent Impt.	Capital Net Gain.
Forwarded from Sheet No. 1.									1,080,[illegible]
13	Stock, American Co.	1/20/11 8/20/11 12/27/13	8/24/26	1,251,697.50		64,950.00 64,140.00 254,140.00			823,897.50
14	Stock, Baldwin Loco.	12/27/13	8/24/26	213,227.50		121,987.50			90,240.00
15	Stock, Baldwin Loco.	12/26/13	[illegible]	72,125.00		43,035.00			29,090.00
16	C.&O.R.R. Pfd.	10/2/22	1/20/26 8/24/26	21,652.00 82,425.00		99,000.00			4,105.00
17	Amer.Lithgrm. Corp.	12/26/13	[illegible]	18,925.00		18,325.00			600.00
18	Brooklyn Union	12/26/13	8/19/26	47,200.00		24,775.00			22,605.00
19	New York Shipbldg.	12/27/13	[illegible]	25,896.00		15,796.00			8,096.00
20	Penna. Water,-Pfd.	1909/1907	8/2/26	47,200.00		26,220.00	25,687.00		18,662.00
21	West Hudson Bridge	1908	4/2/26	98,688.05			100,050.00		1,361.97
22	Fifth Ave. Land Co.	1908 1911	4/22/26	1,000.00		(1,000.00) (1,000.00)	(1,000.00) (1,000.00)	Sch. Prop.	1,000.00
23	Real Estate 4 [illegible]	1908	1926	2,000.00		1,781.40	2,000.00	7 fa	
24	Real Estate " "	1908	1926	780.00		1,866.00	1,560.00	6 fa	780.00
25	Real Estate " "	1908	1926	5,000.00		834.62	1,975.00	[illegible]	1,975.00
26	Real Estate " "	1908	1926	5,000.00		1,819.60	1,666.66	[illegible]	3,333.34
									[illegible]

For Calendar Year 1925

D. 34

6500 FIFTH AVENUE,
(Street and number, or rural route)

PITTSBURGH, PA.
(Post office) (County) (State)

OCCUPATION, PROFESSION, OR KIND OF BUSINESS: BANKER

1. Return filed (or copy of) ... YES
2. If you filed a return for 1924, to what Collector's office was it sent? PITTSBURGH, PA.
3. In which district were you engaged in business during 1925? PA.
4. Name of husband or wife if ... HERBERT L. HERLOW
5. Were you married and living with husband or wife on the last day of your taxable year? YES
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? ---
7. If your status in respect to questions 5 and 6 changed during the year, state date of such change NO
8. How many dependent persons (other than husband or wife) under 18 years of age, or incapable of self-support because mentally or physically defective were you supporting (give only chief support) from you on the last day of your taxable year? ---

1. Salaries, Wages, Commissions, etc. SEE SCHEDULE ATTACHED		8,918.18
2. Net Profit from Business or Profession. (From Schedule A)		NONE
3. Interest on Bank Deposits, Corporation Bonds, etc.		216,275.06
(a) Interest on Tax-free Covenant Bonds Upon Which an Income Tax of 2% was Paid		25,550.22
4. Interest, Dividends, etc.		69,287.51
The Union Tr. Co. of Pgh. Middleton Agcy.	1088	19,745.00
West Overton Distilling Co. Pittsburgh, Pa.	1088	10,000.00
Pittsburgh Brightwood, Irvington, Pittsburgh, Pa.	1088	(1,000.00) Loss
5. Rents and Royalties. (From Schedule B) SEE SCHEDULE ATTACHED		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From schedule C) SEE SCHEDULE ATTACHED		
7. [illegible]		
8. [illegible]		
9. Other Income (including Dividends received on shares of stock owned [illegible]		
(a) DIVIDENDS on Foreign Corporations,		5,129.00
(b) Bond Adjustment with Penna. Water Co.		47,664.28
(c)		
10. TOTAL INCOME IN ITEMS 1 TO 9		1,936,618.15
DEDUCTIONS		
11. Interest Paid		1,042,009.88
12. Taxes Paid. (Enclose in Schedule F) SEE SCHEDULE ATTACHED		59,344.45
13. Losses by Fire, Storm, etc. (Explain in Schedule F)		697.97
14. Bad Debts. (Explain in Schedule F) SEE SCHEDULE ATTACHED		2,850.00
15. Contributions. (Explain in Schedule F) SEE SCHEDULE ATTACHED		144,000.00
16. Other Deductions Authorized by Law. (Explain below or on separate sheet)		85,000.00
(a)		
(b)		
(c)		
17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16		1,334,902.30
18. NET INCOME (Item 10 minus Item 17)		601,715.85

COMPUTATION OF TAX

19. Earned Net Income (not over $30,000)	NONE	32. Net Income (Item 18 or return)	41. Normal Tax (1½% of Item 37) NONE
20. Less Personal Exemption and Credit for Dependents		33. Less Dividends (Item 9 (a) or return)	42. Normal Tax (2% of Item 38) NONE
21. Balance (Item 19 minus 20)	NONE	34. Credit for Dependents	43. Normal Tax (5% of Item 39) NONE
22. Amount taxable at 1½% (not over the first $4,000 of Item 21)		35. Total of Items 32, 33, 34, and 34a	44. Surtax on Item 40 (see instructions 25 as revised) 441,500.61
23. Amount taxable at 3% (not over the second $4,000 of Item 21)		36. Balance (Item 30 minus 35)	45. Adjustment for Capital Gain or Loss (25% of Column 2, [illegible] D) 136,807.40
24. Amount taxable at 5% (balance over $8,000 of Item 21)	NONE	37. Amount taxable at 12½% (not over the first $4,000 of Item 36)	46. Total of Items 41, 42, 43, 44, and 45 578,308.29
25. Normal Tax (1½% of Item 22)	NONE	38. Balance (Item 36 minus 37)	47. Less Credit of 25% of Tax on Earned Net Income (Item 29) NONE
26. Normal Tax (3% of Item 23)		39. Amount taxable at 25% (balance over the amount taxable at 12½%)	48. Total (Item 46 minus 47) 578,308.29
27. Normal Tax (5% of Item 24)		40. Amount taxable at 50% (balance over the amount taxable at 25%)	49. Less Income Tax paid at source (2% of Item 18) 12,034.32
28. Surtax on Item 19	NONE		50. Balance (Item 48 minus 49) to be paid to Collector 566,273.97
28a. Tax on Earned Net Income (total of Items 25, 26, 27, and 28)			
29. Credit of 25% of Item 28a (not over 25% of Items 28, 41, 42, and 43)	NONE		

[redacted]

reported on Line 2,

[redacted]

NONE

17. Total (Items 10 to 16, inclusive)

18. Total Deductions (Line 9 plus Line 17)

19. Net Income (Line 1 minus Line 18) (Enter as Item 2)

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 5)

1. Kind of Property	2. Location	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Should be same as in year)	6. Repairs	7. Other Expenses (Itemize below)	8. Net Profit (Enter as Item 4)

SEE SCHEDULE ATTACHED.

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Previously Allowed	5. Cost	6. Value as of March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter as Item 6)

SEE SCHEDULE ATTACHED.

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Received	5. Depreciation Previously Allowed	6. Cost	7. Value as of March 1, 1913	8. Subsequent Improvements and Capital Deductions	9. Net Gain or Loss (Entered 12½% as Item 6d)

SEE SCHEDULE ATTACHED.

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. Obligations or Securities	2. Interest Received or Accrued	3. Amount Owned	4. Principal Amount Exempt From Taxation	5. Amount Owned in Excess of Exemptions	6. Interest on Amount in Excess of Exemptions (Entered as Item 8)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia			All	XXXXXX XX	XXXXXX XX
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended			All	XXXXXX XX	XXXXXX XX
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possessions of the United States			All	XXXXXX XX	XXXXXX XX
(d) Liberty 4% and 4½% Bonds, Treasury 4% and 4½% Bonds, Treasury Certificates of Indebtedness, and Treasury (War) Savings Certificates	NONE		$5,000		
(e) Liberty 4% and 4½% Bonds			$50,000		
(f) Treasury Notes			None		

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, AND 15

SCHEDULE ATTACHED.

[redacted]ANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AN[redacted]

1. Kind of Property	2. Date Acquired	3. Amt. When Acquired	4. Depreciation Less After Acquirement	5. Cost	6. Value as of March 1, 1913	[redacted]

SEE SCHEDULE.

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 15

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Subsequent Improvements	6. Depreciation Previously Allowed	7. Insurance and Salvage Value	8. Deductible Loss

SEE SCHEDULE.

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

Mr. Richard B. Mellon has been abroad since Feb. 18, 1926 and is not expected to return before May 1st, 1926.

(If return is made by agent, the matter thereafter must be stated on this line)

Richard B. Mellon

(Signature of individual or agent)

by D. J. Hucks, Agent

(Address of individual or agent)

Sworn to and subscribed before me this 17th day of March, 1926.

M. E. Conner

(Signature of officer administering oath)

M. E. CONNER, Notary Public
MY COMMISSION EXPIRES
MARCH 17, 1929

NOTARIAL SEAL

F2

1925.

SCHEDULE "D" - CAPITAL NET GAIN FROM SALE OF ASSETS [illegible]

Item No.	Kind of Property	Date Acquired.	Date Sold	Amount Realized	Expenses Incidentally Attending	Cost	Value Subseq. 3/1/13	Subseq. Cost.	Capital Net Gain.
1	Bonds,	8/19/21	5/20/25	19262.50	--.--	19000.00	--.--	--	[illegible]
2	Stock,	9/16/12	10/10/25	32913.00	--.--	6000.00	6000.00	--	[illegible]
3	Stock,	9/16/12	10/10/25	20878.44	--.--	1665.00	1665.00	--	19213.44
4	Stock,	9/16/12	10/10/25	8256.00	--.--	505.38	505.38	--	7750.62
5	Stock,	* 3/1/13 1/3/16	2/1/25	4475.00	--.--	2960.00 500.00	--.--	--.--	[illegible]
6	Real Estate,		1925	565511.02	--.--	--.--	357566.40	149638.77	77506.85
7	Stock,	12/29/22	6/26/25	9462.00	--.--	11830.00	--.--	--.--	[illegible]
	THE ABOVE OWNED JOINTLY BY ANDREW W. MELLON AND RICHARD B. MELLON			$ 558814.96	--.--	42458.38	365554.78	149638.77	130262.41
	RICHARD B. MELLON'S ONE-HALF OF ABOVE.			$ 329407.48	--.--	21229.19	182767.39	74519.39	65178.70
8	A.Overholt & Co. Liquidation	1919	1925	2185374.72	CAP.INV. 1506071.08	--.--	--.--	--	[illegible]
9	West Overton Dist.Co. Liquidation	1919	1925	189251.42	CAP.INV.	71192.35	--.--	--	[illegible]
10	Real Estate (Diamond Square)	1889	1925	60067.83	1615.00	17071.06	61625.00	--	47.83
11	Real Estate "	1889	1925	84787.50	2280.00	38888.41	87000.00	--	57.50
12	Real Estate (W.L.M.72)	1901	1925	4745.67	--.--	9772.47	11086.82	--	Loss [illegible]
13	Stock Liquidation)	1902	1925	2448.62	--.--	1666.66	1666.66	--	781.96
14	Bonds,	1913	1925	203.70		200.00	200.00	--	3.70
15	Real Estate (Lots)	1921	1925	1938.76	--.--	754.00	--.--	--	1184.76
16	Liquidation (Stock)	1920	1925	450.00	--.--	--.--	--.--	--	450.00
17	Real Estate	1918	1925	20000.00	--.--	12613.52	12613.52	--	7386.48
	TOTAL NET - $ 1,070,411.84			$ 2878,643.70	3895.00	1476458.74	346959.39	74519.39	1070411.84

The omitted portions of said Defendant's Exhibits "X" and "Y," together with the parts set forth above, are also incorporated herein by reference and made part hereof, the original said exhibits in certified photostatic form having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibits be sent up in their original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

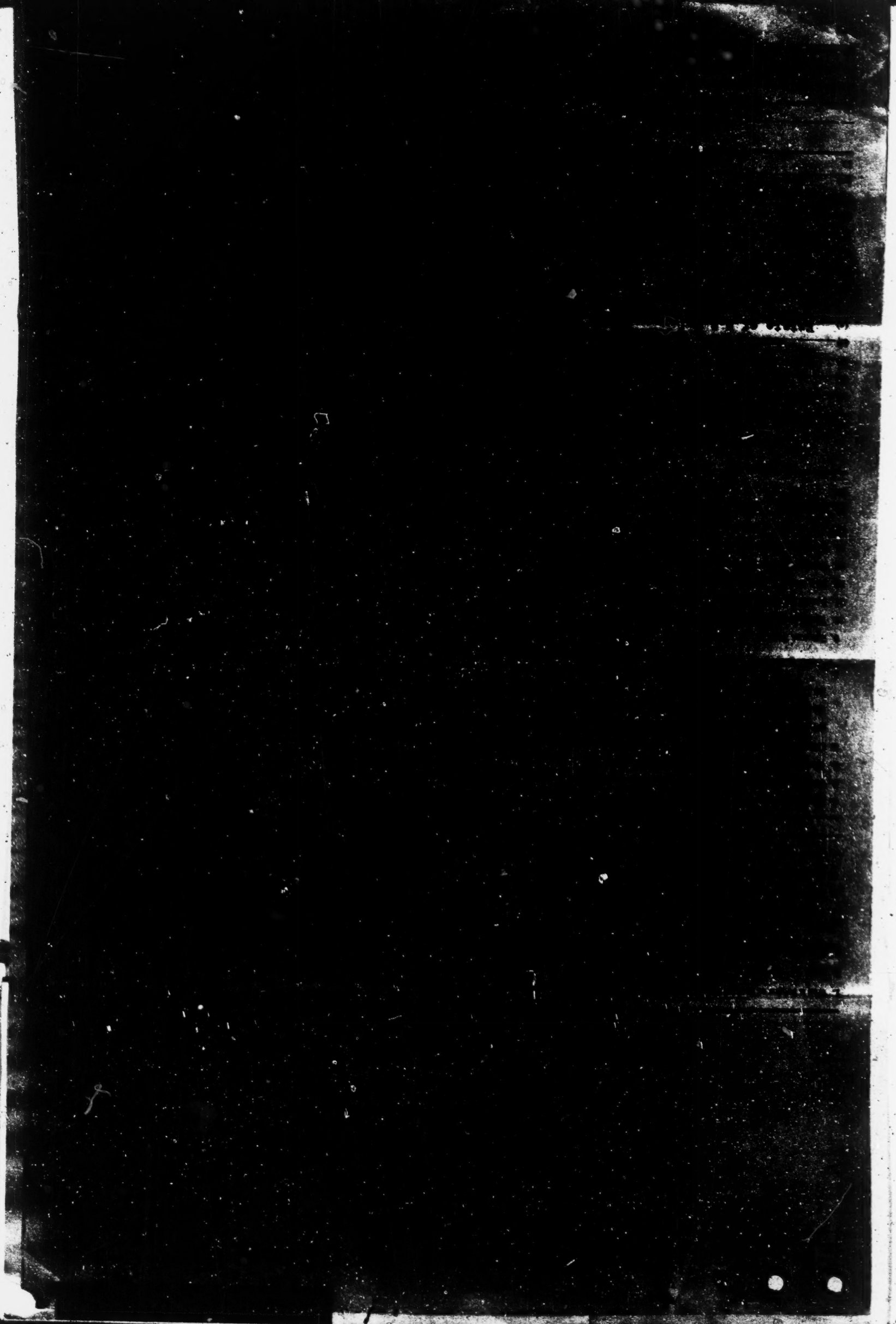
That Defendant's said Exhibits "Z" and "AA" so offered and admitted in evidence, as aforesaid, are in words and figures as follows:

Defendant's Exhibit "Z".

(Page 489.)

Defendant's Exhibit "AA".

(Page 490.)



[redacted]

[redacted]							
		NONE					

[redacted]

SCHEDULE D.—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS [redacted]

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. [redacted]	5. [redacted]	6. Cost	7. [redacted]	8. [redacted]	9. [redacted]
			SEE SCHEDULE ATTACHED					

State how property was acquired

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 11, AND 12

NONE

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Previous Less Allowed [redacted]	5. Cost	[redacted]	[redacted]
		NONE				

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN [redacted]

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. [redacted]
		NONE		

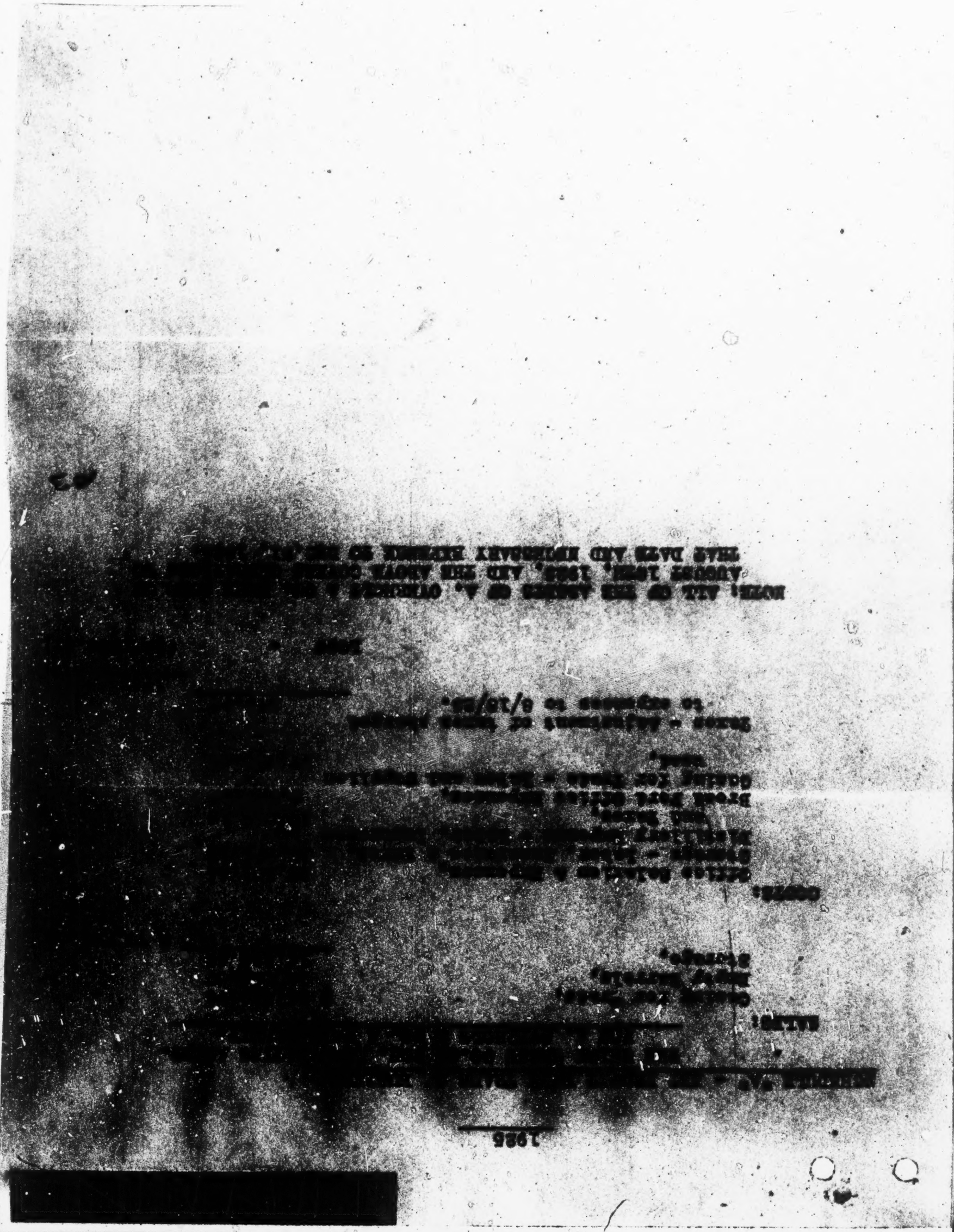
I swear (or affirm) that this return, including the accompanying [redacted] is a true and complete return made in good faith for the accounting period as stated [redacted] 1917.

Sworn to and subscribed before me this 15th day of March

Hattie M. Dark

(Signature of officer administering oath)

Notary [redacted]



SCHEDULE "D" - CAPITAL NET GAIN FROM SALE OF ASSETS.

THE UNION TRUST CO. OF PGH. LIQUIDATING AGENT
FOR A. OVERHOLT & CO., A PARTNERSHIP.

CAPITAL ACCOUNT TO DEC. 31, 1925:

Capital account as of Jan. 1st, 1919 (Date of Organization):

A.W. Mellon,	$ 1,414,027.5
R.B.Mellon,	1,414,027.5
H.C.Frick (Mr. Frick died Dec. 1919),	1,414,027.5
	$ 4,242,082.5

PROFITS & LOSSES PER BOOKS TO 1925:

		Profit	Loss
1919	-	--.--	654,080.45
1920	-	145,052.23	--.--
1921	-	--.--	23,876.89
1922	-	49,644.33	--.--
1923	-	--.--	35,046.29
1924	-	24,606.25	--.--
		$ 219,302.81	713,003.61

ADJUSTMENTS:

1916-17	- Unpaid Assess. Corp. Inc. Taxes 1916-17.	--.--	21,459.95
1919	- Depres.Disallowed by Int. Revenue Dept.	198,558.85	--.--
1920	- Liquidation Disallowed,	646,327.63	--.--
1921	- Liquid.Exp.Disallowed	--.--	74,304.90
1919	- 1918 Income Tax Paid by Partnership,	--.--	706,696.55
1925	- Dist.to Employes at Dissolution		100,000.00
	- Misc. Reserves Taken up,	10,155.51	
	Do.	500.00	
		$1074,888.00	1615,464.81

NET CAPITAL DECREASE, $ 540,642.81

$ 5,782,725.38

PROFITS FOR YEAR 1925 AS PER RETURN - 207,772.77

TOTAL CAPITAL FOR LIQUIDATION - DEC. 31, 1925 $ 5,990,498.15

A.W. Mellon,	$1,996,971.06
R.B. Mellon,	1,996,972.06
Estate of H.C. Frick,	1,996,971.07
	$5,990,815.25

1925

SCHEDULE "D" - CAPITAL NET GAIN FROM SALE OF ASSETS.

THE UNION TRUST CO. OF PGH. LIQUIDATING AGENT
FOR A. OVERHOLT & CO. A PARTNERSHIP.

ALL OF THE ASSETS, EXCEPTING CERTAIN BILLS RECEIVABLE AND CASH, ON AUGUST 18TH, 1925 WERE SOLD TO D.A. SCHULTE OF NEW YORK, N.Y.

CASH: - PAYMENTS TO PARTNERS A/C LIQUIDATION;

A.W. Mellon		$ 2,185,374.72	
R.B. Mellon,		2,185,374.72	
Estate of H.C.Frick,	$2,185,374.71		
Less charges to a/c	400,000.00	1,785,374.71	
			6,156,124.15
CASH RESERVED FOR 1916-17 ASSESSMENT AGAINST A. OVERHOLT & CO. A CORPORATION,			21,459.85
CASH RESERVED FOR 1918 INCOME TAX ADJUSTMENT A. OVERHOLT & CO. A CORPORATION,			165,000.00
CASH RESERVED FOR ACCTS. PAYABLE & MISC. EXPENSES;			50,811.07
			$ 6,393,395.17
			2,131,131,72

	A.W.MELLON	R.B. MELLON	EST.H.C.FRICK.
LIQUIDATION,	$ 2,185,374.72	2,185,374.72	1,785,374.71
CAPITAL AS 12/31/25.	1,303,071.08	1,303,071.08	1,303,071.07
CAPITAL NET GAIN.	$ 882,303.64	882,303.64	482,303.64
		ADD CHARGES TO A/C.	400,000.00
			$ 882,303.64

B5

Form 1041
U. S. Internal Revenue

FIDUCIARY RETURN OF

1. Was a return of income for 1936 filed on behalf of this estate or trust
2. If so, to what collector's office was it sent
3. Give date of filing

Income

1. Net profit from Trade or Business (from schedule
2. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds
3. Income from Partnerships, Fiduciaries, etc. (Attach statement showing name and address of each)
4. Rents and Royalties. (From schedule on Building, Tax Affairs, Office)
5. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From schedule on page 2)
6. Dividends on Stock of Domestic Corporations
7. Other Income (including dividends received on stock of foreign corporations)
   (a)
   (b)
   (c)
8. TOTAL INCOME IN ITEMS 1 TO 7

DEDUCTIONS

9. Interest Paid
10. Taxes Paid
11. Losses by Fire, Storm, etc. (Explain in table on page 2)
12. Bad Debts. (Explain in Schedule II)
13. Contributions. (Explain in Schedule II)
14. Other Deductions Authorized by Law. (Explain in Schedule II)
15. TOTAL DEDUCTIONS IN ITEMS 9 TO 14
16. NET INCOME (Item 8 minus Item 15)
17. BENEFICIARIES' SHARES OF INCOME

1. NAME AND ADDRESS OF BENEFICIARY (If partnership, name and address of each partner)	2. Amount of Income of Beneficiary
(a) R.B. Mellon,	
(b)	
(c) A.W. Mellon,	
(d)	
(e) Estate of R.B.	
(f)	
(g)	
(h)	
(i)	
(j)	
(k)	
(l)	
(m) TOTALS	

18.

(a) Obligations of a State, Territory, or any political subdivision
(b) Securities issued under the provisions of the
(c) Liberty 3½% Bonds and other obligations

SCHEDULE A—[illegible] TRADE OR BUSINESS (See Instruction 1)

[illegible] - ASSETS SOLD AUG. 1926.

		$
Other Business Deductions		
11. [illegible], exclusive of "Labor," reported on Line 2	$	
12. [illegible]		
13. Taxes on business and business property		
14. [illegible] (explain in table provided [illegible] at front of page)		
15. Bad debts arising from sales [illegible] SEE SCHEDULE ATTACHED.		
16. [illegible] (explain [illegible] at front of page)		
17. [illegible] (Itemize below or [illegible])		
18. Total (Lines 10 to 16, inclusive)	$	
19. Total Deductions (Line 6 plus Line 17)		$
20. Net Profit (Line 1 minus Line 19) (Enter as Item 3)		$

[illegible]
allowed on Lines 2 and [illegible]

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 4)

1. Kind of Property	2. Amount	3. Date	4. Value as of March 1, 1913	5. Depreciation (Number of years at first of page)	6. Repairs	7. Other Expenses (Itemize below)	8. Net Profit (Enter as Item 4)
Dwelling	$ 89.36	$ ---.--	$ ---.--	$ NONE	$ ---.--	$ ---.--	$ 89.36

[illegible]
allowed on Lines 5 and [illegible]

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 5)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Previously Allowed	5. Cost	6. Value as of March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter as Item 5)
		$ NONE	$	$	$	$	$

State how property was acquired [illegible]

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Received	5. Depreciation Previously Allowed	6. Cost	7. Value as of March 1, 1913	8. Subsequent Improvements and Capital Deductions	9. Net Gain or Loss (Enter in Column 5, Item 17)
			$ SEE SCHEDULE ATTACHED.	$	$	$	$	$

State how property was acquired [illegible]

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 13, AND 14

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost	6. Value as of March 1, 1913	Amount of Depreciation Charged Off	
						7. Previous years	8. This year
		NONE		$	$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 11

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Subsequent Improvements	6. Depreciation Previously Allowed	7. Insurance and Salvage Value	8. Deductible Loss
		$ NONE	$	$	$	$	$

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith for the accounting period as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this 15th day of March, 1926.

Grafton M. Dark, Notary Public.
(Signature of officer administering oath) (Title)

W. W. Trustee
(Signature of fiduciary or officer representing fiduciary)

(Address of fiduciary or officer)

(An amended return must be plainly marked "Amended" across face of return)

9—22048

1925

THE UNION TRUST CO. OF PGH. LIQUIDATING AGENT
FOR WEST OVERTON DISTILLING COMPANY, A PARTNERSHIP.

SCHEDULE "A" - PROFIT FROM TRADE OR BUSINESS.

SALES (No sales made).

EXPENSES 1925:

Insurance,	$ 1,596.98	
Taxes,	3,791.70	
Salaries,	5,951.50	
Labor - General Expense.	4,596.10	
Water, Light Heat & Fuel, etc.	625.76	
Supplies charged off at date of sale of assets, Aug. 18th, 1925.	12,846.54	
		29,408.58
LOSS - (		$ 29,408.58)

98

1925

SCHEDULE "D" - CAPITAL NET GAIN FROM SALE OF ASSETS.

THE UNION TRUST CO. OF PGH. LIQUIDATING AGENT
FOR WEST OVERTON DISTILLING COMPANY, A PARTNERSHIP.

CAPITAL ACCOUNT TO DEC. 31ST, 1925.

Capital as of Jan. 1st, 1919 (Date of organization):

A.W.Mellon,	$65,231.18	
R.B.Mellon,	65,231.18	
H.C.Frick, (Mr.Frick died Dec. 1919)	65,231.19	
		$ 195,693.55

PROFITS & LOSSES PER BOOKS:

	Profit	Loss
1919 to 7/31/19	17,455.41	--.--
1919 to 12/31/19	--.--	42,252.34
1920	17,881.64	--.--
1921	--.--	30,082.74
1922	--.--	31,966.35
1923	--.--	29,814.37
1924	--.--	22,933.21
	35,337.05	157,049.01
1919 - Inv.Deprec.dissalbwed by Int. Rev. Dept.	30,169.17	--.--
1920 - Liquidation dissallowed.	158,426.09	--.--
1920 - Liquid.Expense " "	--	19,768.71
	$ 223,930.31	176,817.72

NET INCREASE -		47,112.59
		$ 242,806.14
NET LOSS YEAR 1925 AS PER RETURN -		(29,229.07)
NET CAPITAL FOR LIQUIDATION- DEC.31, 1925.		$ 213,577.07

A.W. Mellon,	$ 71,192.36
R.B. Mellon,	71,192.35
H.C.Frick Estate,	71,192.36
	$ 213,577.07

D4

1925

SCHEDULE "D" - CAPITAL NET GAIN FROM SALE OF ASSETS.

THE UNION TRUST CO. OF PGH. LIQUIDATING AGENT
FOR WEST OVERTON DISTILLING COMPANY, A PARTNERSHIP.

ALL OF THE ASSETS, EXCEPTING CERTAIN BILLS RECEIVABLE AND CASH, WERE SOLD AS FOLLOWS:
AUGUST 18TH, 1925 TO D.A. SCHULTE, N.Y.- ALL CERTIFICATES.
AUGUST 31ST, 1925 - BUILDINGS, FIXTURES, ETC.

TOTAL CAPITAL FOR LIQUIDATION HELD BY UNION TR. CO. OF PGH. $517,694.25

A.W. Mellon, -		189231.42
R.B. Mellon,		189231.42
Estate H.C.Frick	189,231.41	
Less Charges to a/c	50,000.00	139231.41
		$ 517694.25

	A.W.MELLON	R.B.MELLON	EST.H.C.FRICK.
LIQUIDATION,	$ 189,231.42	189,231.42	189,231.41
CAPITAL,	71,192.36	71,192.35	71,192.36
	$ 118,039.06	$ 118,039.07	$ 68,039.05
		ADD CHARGES TO A/C	50,000.00
			$ 118,039.05

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Thereupon defendant's counsel offered in evidence, separately, Defendant's Exhibits "BB" and "CC", being duly certified photostatic copies of two letters, each dated March 15, 1929, with statement attached, to A. W. Mellon and Richard B. Mellon, Pittsburgh, from the Commissioner of Internal Revenue, to each of which offers plaintiffs' counsel expressly stated they had no objection.

Which Defendant's said Exhibits "BB" and "CC" so offered and admitted in evidence are in words and figures as follows:

Defendant's Exhibit "BB".

March 15, 1929.

Hon. A. W. MELLON,
Woodland Road,
Pittsburgh, Pennsylvania.

Sir:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1925 discloses a deficiency of $48,906.45, as shown in the statement attached.

The section of the law above-mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed Form 866 and

forward both original and duplicate to the Bureau of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

Enclosures:
Statement
Form 866
Form 882

STATEMENT, MARCH 15, 1929.

In re: Hon. A. W. Mellon,
Woodland Road,
Pittsburgh, Pennsylvania.
TAX LIABILITY.

Year	*Corrected Tax Liability*	*Tax Previously Assessed*	*Deficiency*
1925	$1,309,448.18	$1,260,541.73	$48,906.45

Reference is made to the report of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, and to your protest submitted to that official under date of June 21, 1928.

Careful consideration has been accorded your protest. The contention that dividends amounting to $1,000.00 received from the Inspiration Copper Company were nontaxable has been conceded. The contention that of the dividends received from the Kennecott Copper Company, $7,750.14 were nontaxable, has been conceded in part. Information submitted to this office by the corporation discloses that $7,685.44 was nontaxable.

Your adjusted return is as follows:

Ordinary income reported		$5,064,727.16
Add:		
1. Additional income from rents ..		73,352.32
2. Additional dividends		14,119.70
Total		$5,152,199.18
Deduct:		
3. Profit on liquidation of A. Overholt and Company eliminated	$69,257.57	
4. Profit on liquidation of West Overton Distilling Company eliminated	9,743.03	79,000.60
Ordinary income adjusted		$5,073,198.58
Capital net gain reported		$2,053,266.80

Add:		
1. Additional profit on A. Overholt and Company		345,648.87
2. Additional profit on West Overton Distilling Company		10,686.69
3. ⅓ profit on sale of 1,800 shares Gulf Oil Corporation stock		21,202.17
Total		$2,430,804.53
Deduct:		
4. Profit on exchange of Pennsylvania Water Company stock		495.00
Capital net gain adjusted		$2,430,309.53
COMPUTATION OF TAX.		
Ordinary income adjusted		$5,073,198.58
Less:		
Dividends	$5,477,663.44	
Personal exemption	3,900.00	5,481,563.44
Income subject to normal tax		None
Surtax on $5,073,198.58		$1,006,299.72
Tax at 12½% on $2,430,309.53		303,788.69
Total tax		$1,310,088.41
Less:		
Earned income credit	$ 12.37	
Tax paid at source	627.86	640.23
Tax assessable		$1,309,448.18
Tax assessed		1,260,541.73
Deficiency		$ 48,906.45

Explanation of Items Changed in Ordinary Income.

1. Additional income from rents is due to the elimination of taxes paid for J. M. Guffey Company amounting to $13,852.32, also to the elimination of attorneys' fees of $59,500.00 paid in connection with the perfection of titles to certain coal properties which fees are considered capital expenditures.

2. Additional dividends represent dividends of $64.70 and $14,055.00 received from the Kennecott Copper Company and the Gulf Oil Corporation, respectively.

3 and 4. Profit reported on the liquidation of A. Overholt Company and the West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain.

Explanation of Items Changed in the Computation of Capital Net Gain.

1. Profit on the liquidation of A. Overholt Company has been computed as follows:

Amount received in liquidation	$2,185,374.71
Add:	
Your share of gifts to employees ..	33,333.33
Total	$2,218,708.04
Value December 2, 1919	990,755.53
Profit	$1,227,952.51
Profit reported	882,303.64
Additional to be reported	$ 345,648.87

2. Profit on West Overton Distilling Company has been computed as follows:

Amount received	$189,231.41
Value December 2, 1919	60,505.66
Profit	$128,725.75
Profit reported	118,039.06
Additional to be reported	$ 10,686.69

3. One-third profit on the sale of 1800 shares of Gulf Oil Company stock has been computed as follows:

⅓ of selling price	$51,379.67
⅓ of cost	30,177.50
⅓ of profit	$21,202.17

4. Taxable profit on the exchange of stock of the Pennsylvania Water Company is limited to the cash received. As you reported a profit of $506.50 and received $11.50 in cash, the profit was overstated by $495.00.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

You are advised that a copy of this communication has been transmitted to your attorney, Mr. William A. Seifert, Pittsburgh, Pennsylvania, who has on file in this office a duly recorded power of attorney.

Defendant's Exhibit "CC".

March 15, 1929

Mr. Richard B. Mellon,
6500 Fifth Avenue,
Pittsburgh, Pennsylvania.

Sir:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1925 discloses a deficiency of $41,008.84, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is

FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. BLAIR,
Commissioner.

(Signed) C. B. ALLEN,
Deputy Commissioner.

Inclosures:
Statement
Form 866
Form 882

STATEMENT, MARCH 15, 1929.

In re: Mr. Richard B. Mellon,
6500 Fifth Avenue,
Pittsburgh, Pennsylvania.

TAX LIABILITY.

Year	*Corrected Tax Liability*	*Tax Previously Assessed*	*Deficiency*
1925	$815,800.12	$774,791.28	$41,008.84

Reference is made to the report of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania. The adjustments recommended by the agent have been approved as submitted with the exception of the computation of capital net gain which adjustment is explained below.

The adjusted return is as follows:

Income reported		$3,249,204.03
Add:		
1. Additional rents		13,852.32
2. Additional dividends		14,055.00
3. Contributions disallowed		1,000.00
4. Loss on liquidation of West Overton Distilling Company eliminated		9,743.02
Total		$3,287,854.37
Deduct:		
5. Profit on liquidation of A. Overholt and Company	$69,257.57	
6. Error in computation	.20	69,257.77
Ordinary income adjusted		$3,218,596.60
Capital net gain reported		$1,070,411.84
Add:		
1. Additional profit on liquidation of A. Overholt and Company		345,648.87
2. Additional profit on liquidation of West Overton Distilling Company		10,686.69
3. One-third profit on sale of 1800 shares of Gulf Oil Corporation stock		21,202.17
Total		$1,447,949.57

Deduct:	
4. Profit on exchange of Pennsylvania Water Company stock overstated	495.00
Capital net gain adjusted	$1,447,454.57

COMPUTATION OF TAX.

Ordinary income adjusted	$3,218,596.60
Less:	
Dividends	4,509,368.98
Income subject to normal tax	None
Surtax on $3,218,596.60	$ 635,379.32
Tax at 12½% on $1,447,454.57	180,931.82
Total tax	$ 816,311.14
Less:	
Tax paid at source	511.02
Tax assessable	$ 815,800.12
Tax previously assessed	774,791.28
Deficiency in tax	$ 41,008.84

Explanation of Items Changed in the Computation of Ordinary Income.

1. Increase in income from rents is due to the elimination of taxes amounting to $13,852.32 paid for the J. M. Guffey Company which amount is held to be additional cost of investment.

2. Increase in dividends represents dividends paid on stock of the Gulf Oil Corporation which was omitted on your return.

3. A contribution of $1,000.00 to the Twenty-eighth Division Publishing Company has been disallowed as this organization does not meet with the requirements of Section 214 of the Revenue Act of 1926.

4. Loss on the liquidation of the West Overton Distilling Company has been eliminated. The profit reportable on this liquidation has been considered as capital net gain.

5. The profit on liquidation of A. Overton and Company has been eliminated as this profit is considered capital net gain.

6. An error of $0.20 in computation of income has been corrected.

Explanation of Items Changed in the Computation of Capital Net Gain

1. Profit on the liquidation of A. Overholt Company has been computed as follows:

Amount received in liquidation	$2,185,374.71
Your share of gifts to employees	33,333.33
Total	$2,218,708.04
Value December 2, 1919	990,755.53
Profit	$1,227,952.51
Profit reported	882,303.64
Additional to be reported	$ 345,648.87

2. Profit on the liquidation of the West Overton Distilling Company has been computed as follows:

Amount received	$189,231.41
Value December 2, 1919	60,505.66
Profit	$128,725.75
Profit reported	118,039.06
Additional to be reported	$ 10,686.69

3. Profit on the sale of 1800 shares of stock of the Gulf Oil Corporation has been computed as follows:

⅓ of selling price	$51,379.67
⅓ of cost	30,177.50
⅓ of profit	$21,202.17

4. Taxable profit on the exchange of stock of the Pennsylvania Water Company is limited to the cash received. As you reported a profit of $506.50 and received $11.50 in cash, the profit was overstated by $495.00.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

You are advised that a copy of this communication has been transmitted to your attorney, Mr. William A. Seifert, Pittsburgh, Pennsylvania, who has on file in this office a duly recorded power of attorney.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "DD," being certified photostatic copy of protest and brief, with exhibits attached, addressed to the Commissioner of Internal Revenue, and submitted by H. M. Johnson, agent of A. W. Mellon, Pittsburgh, Pennsylvania, June 21, 1928.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows (Four exhibits, attached to Defendant's Exhibit "DD," relating to Inspiration Consolidated Copper Co., Kennecott Copper Corporation, Anaconda Copper Mining Company, and Chile Copper Company are not material to the issues herein and are, therefore, omitted):

Defendant's Exhibit "DD".

(Pages 504 a-504 o.)

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON, D. C.

RECEIVED
JUN 21 1928
Internal Revenue Agent in Charge
PITTSBURGH, PA.

In the Matter of	Revenue Agent's Report Dated February 15, 1928.
The audit of the income tax returns filed by HONORABLE A. W. MELLON, Woodland Road, Pittsburgh, Pennsylvania, for the calendar years 1924 and 1925.	Letter of Transmittal Dated March 20th, 1928.

PROTEST AND BRIEF

HONORABLE D. H. BLAIR,
Commissioner of Internal Revenue,
Washington, D. C.

MR. W. P. MAYS,
Internal Revenue Agent in Charge,
Pittsburgh, Pennsylvania.

The letter of transmittal grants the taxpayer thirty days' time in which to file a protest. The time in which to file this protest was extended to June 21, 1928.

The above named taxpayer, Hon. A. W. Mellon, protests certain adjustments made by the Revenue Agent as set forth in his report dated February 15, 1928, which may be summarized as follows:

1. The Revenue Agent determined that the taxpayer sustained a capital net loss of $337,461.54 in the year 1924 on the sale of 500 shares of the capital stock of the J. M. Guffey Company. The taxpayer submits that the deduction to which he is entitled on account of the sale of the said capital stock, which was collateral for a loan was $376,251.45, and that said amount is not subject to the capital gain or loss provisions of the Revenue Act of 1924.

2. The Revenue Agent determined that the taxpayer had a liquidating net capital profit in the year 1925 of $1,856,515.99 on the sale of the assets of A. Overholt & Company and West Overton Distilling Company and final distribution in liquidation. The taxpayer submits that the Revenue Agent erroneously included in the said liquidating profit $489,724.67 which is alleged to be profit on the disposal of the capital stock of A. Overholt & Company, a corporation.

3. The Revenue Agent erroneously increased the taxpayer's income for the year 1925 by the amount of $1,000.00, alleging same to be taxable dividends received from the Inspiration Consolidated Copper Company.

4. The Revenue Agent erroneously increased the taxpayer's income for the year 1925 by the amount of $7,750.14, alleging that same constituted taxable dividends received from the Kennecott Copper Company.

5. The taxpayer erroneously included in his return for the year 1925 dividends of $5,250.00 received from the Anaconda Copper Mining Company.

6. The taxpayer erroneously included in his taxable income for the year 1925 a dividend of $536.84 which represented dividends from the Chili Copper Company paid out of Depletion Reserve.

Point I.

The Revenue Agent determined that the taxpayer sustained a capital net loss of $337,461.54 in the year 1924 on the sale of 500 shares of the capital stock of the J. M. Guffey Company. The taxpayer submits that the deduction to which he is entitled on account of the sale of the said capital stock, which was collateral for a loan was $376,251.45, and that said amount is not subject to the capital gain or loss provisions of the Revenue Act of 1924.

In the Revenue Agent's Report it is stated that the proportionate part of $58,198.61, being taxes paid by Hon. A. W. Mellon and Mr. R. B. Mellon on the properties owned by J. M. Guffey Company, was not an allowable deduction for the reason that it was the equivalent of an advance or loan to the company. He therefore disallowed one-half of this amount, or $29,099.30, being the taxpayer's proportionate part. Likewise the said individuals paid taxes on the said properties for the year 1923 in the amount of $52,052.50. The Commissioner of Internal Revenue deemed that to be in effect a loan to the said company and disallowed as a deduction from gross income of the taxpayer one-half of the said amount or $26,026.25, being the taxpayer's proportionate part. In 1924 there was also paid for and in behalf of the Guffey Company interest in the amount of $3,047.42 on loan of Mr. Guffey on the insurance policies which amount should also be added to the Revenue Agent's figures.

The taxpayer agrees with the findings of the Revenue Agent that the taxes paid for the company were not allowable deductions under the heading "Taxes Paid" and that they were in effect loans made to the J. M. Guffey Company.

The net amount of loans made to the said company by the taxpayer and his brother, Mr. R. B. Mellon, as shown by the Revenue Agent is $1,174,923.07. To this item should be added the taxes paid for the company and which the Commissioner and the Revenue Agent have determined to be additional loans, the amounts of $52,052.50 paid in the year 1923, and $58,198.61 paid in the year 1924, and interest payment of $3,047.42. This results in net loans made to the J. M. Guffey Company as of 1924 of $1,288,221.60.

These loans were secured by collateral of 1000 shares of the capital stock of J. M. Guffey-Company and life insurance policies on the life of Mr. J. M. Guffey. The cash surrender value of these life insurance policies as of December 31, 1924, against which Mr. Guffey had borrowed money was $86,509.00.

On or about December 30, 1924, Mr. R. B. Mellon and the taxpayer sold 500 shares of the capital stock of J. M. Guffey Company for which they received $250,000.00, which amount was applied against the loans made to the said Guffey. This left 500 shares of the capital stock of the said company and the life insurance policies as collateral for the balance of the loan.

The 500 shares of the said capital stock had a cash value on December 30, 1924 of $250,000.00 based on the selling price of 500 shares sold on that date, which amount together with the value of $86,509.00, less loan thereon of $50,790.30, on the life insurance policies results in a total value of $285,718.70 for the collateral.

C 4

Since the total net loans amounted to $1,288,221.60 less $250,000.00, proceeds from sale of part of the collateral, the balance of $1,038,221.60 was secured by collateral of the value of $285,718.70.

The taxpayer determined that the loans should be written down from $1,038,221.60 to the value of the collateral of $285,718.70 leaving a total amount of $752,502.90 which represents an ascertainment and determination of the partial worthlessness of the J. M. Guffey notes and the collateral thereon to bring the value of said notes on [illegible] books down to the actual value as of December 31, 1[illegible] write down is to be divided equally between Mr. R. [illegible] taxpayer as the loans to the company were [illegible]

It can therefore be [illegible] is not one that involves the [illegible] Keystone Act of 1924 and that the write down by [illegible] account of these loans is a deduction [illegible] both normal and surtax.

The following is a [illegible] determined by the [illegible] were made to the said J. M. Guffey and on account of the sale of collateral [illegible]

Balance of loans		$1,038,221.60
Value of remaining collateral:		
500 shares J.M.Guffey Co.stock	$250,000.00	
*Life insurance policies	35,718.70	285,718.70
Amount determinable and sustained in 1924		$ 752,502.90
Amount attributable to taxpayer, being one-half of the total amount		$ 376,251.45

*Cash surrender value of insurance policies Dec. 31, 1923		$ 82,712.00
Add premiums for 1924	$6,950.00	
Less dividends	3,153.00	3,797.00
Approximate cash surrender value of policies Dec. 31, 1924		$ 86,509.00
Less loans on policies		50,790.30
Value of policies on Dec. 31, 1924		$ 35,718.70

It is respectfully submitted that the amount of $376,251.45 is the correct amount of the deduction to which taxpayer is entitled in the year 1924 and that the same is a deduction from ordinary net income and is not subject to the capital gain or loss provision of the Revenue Act of 1924.

Point 2.

The Revenue Agent determined that the taxpayer had a liquidating net capital profit in the year 1925 of $1,856,515.99 on the sale of the assets of A. Overholt & Company and West Overton Distilling Company and final distribution in liquidation. The taxpayer submits that the Revenue Agent erroneously included in the said liquidating profit $489,724.67 which is alleged to be profit on the disposal of the capital stock of A. Overholt & Company, a corporation.

On page 27 of the Revenue Agent's Report, Schedule No. 4-Q, the liquidating profit has been segregated by the Revenue Agent as follows:

A. Overholt & Company, Partnership,	$1,238,095.95
A. Overholt & Company, Corporation,	489,724.67
West Overton Distilling Company, Partnership,	128,695.37
Total liquidating profit	$1,856,515.99

The taxpayer does not dispute the liquidating profit as determined by the Revenue Agent in connection with the distribution in final liquidation of A. Overholt & Company and West Overton Distilling Company, partnerships, but respectfully submits that the alleged liquidating profit of $489,724.67 on A. Overholt & Company, corporation, is erroneous.

On December 30, 1918, A. Overholt & Company, partnership, and West Overton Distilling Company, partnership, took over all of the assets of the A. Overholt & Company, corporation, and West Overton Distilling Company, corporation, respectively.

The businesses of these partnerships were conducted until December 3, 1919, when Mr. H. C. Frick, one of the partners, died, and from that time on the partnerships were in liquidation and in 1925 final distribution in liquidation was made.

Subsequently The Union Trust Company of Pittsburgh was appointed Liquidating Agent for the said partnerships.

The Revenue Agent has recommended that there be included in the income of the taxpayer for the year 1925 profit alleged to have been realized by him in the disposal of the capital stock of A.Overholt & Company.

As will be noted from the above history of the transaction all of the assets of the corporations were taken over by the partnerships on December 30, 1918. The Revenue Agent does not give any reason or explanation why he has included this alleged profit in the year 1925 and the taxpayer is at a loss to understand on what facts and conclusion of law he arrived at his conclusion. Bruning report

It is respectfully submitted that there could be no profit or loss whatsoever to the taxpayer in the year 1925 in connection with the transfer of the assets of the corporations to the partnerships. This was a transaction that took place in 1918.

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Point 3.

The Revenue Agent erroneously increased the taxpayer's income for the year 1925 by the amount of $1,000.00, alleging same to be taxable dividends received from the Inspiration Consolidated Copper Company.

The taxpayer did not report the dividends received from the Inspiration Consolidated Copper Company for the reason that he received notification from the said company that the dividends of $1,000.00 were paid out of depletion reserve or capital.

Since these dividends of $1,000.00 were paid out of capital it follows that the same are not subject to tax.

There is attached hereto and made a part hereof, Exhibit "A", being a photostat of a letter from Mr. J. W. Allen, Treasurer, Inspiration Consolidated Copper Company, dated March 4, 1926, advising that the dividends in question were paid out of Depletion Reserve.

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Point 4.

The Revenue Agent erroneously increased the taxpayer's income for the year 1925 by the amount of $7,750.14, alleging that same constituted taxable dividends received from the Kennecott Copper Company.

In the year 1925, the taxpayer received a dividend of $3.00 per share on the capital stock owned by him in the Kennecott Copper Company. In his return for that year he reported as taxable dividends received from this company $1.066 per share and excluded $1.934 per share or the total amount of $7,750.14, for the reason that this portion represented dividends paid out of depletion reserve or capital. This is the amount that the Revenue Agent added back to income.

The taxpayer was notified by the Kennecott Copper Company that $7,750.14 was paid out of depletion reserve.

There is attached hereto and made a part hereof, Exhibit "B", being a photostat of letter from Mr. Stephen Birch, President of the Kennecott Copper Company, dated February 25, 1926, which states that $1.934 dividends paid to the taxpayer in the year 1925 were paid out of Depletion Reserve.

Point 5.

The taxpayer erroneously included in his return for the year 1925 dividends of $5,250.00 received by him in that year from the Anaconda Copper Mining Company.

The amount of $5,250.00 was erroneously reported by the taxpayer as taxable income for the reason that at that time he was unaware that said dividends had been paid out of capital.

It is respectfully submitted that this amount should be excluded from the income of the taxpayer for the year 1925.

There is attached hereto and made a part hereof, Exhibit "C", being a photostat of a letter from Mr. A. H. Melin, Treasurer of the Anaconda Copper Mining Company, stating that the said dividends were paid out of Depletion Reserve.

Point 6.

The taxpayer erroneously included in his taxable income for the year 1925 a dividend of $528.84 which represented dividends from the Chili Copper Company paid out of Depletion Reserve.

Included in the taxpayer's return for the year 1925 are dividends totaling $2,625.00 received from the Chili Copper Company. Of this amount $528.84 is non-taxable for the reason that same was paid out of Depletion Reserve or capital.

It is respectfully submitted that the income for the year 1925 should be reduced by $528.84.

There is attached hereto and made a part hereof, Exhibit "D", being a photostat of a letter dated February 15, 1927, from Mr. C. W. Welch, Secretary-Treasurer of the Chili Copper Company, advising the taxpayer that of the dividends paid to him in the year 1925, $528.84 was paid out of Depletion Reserve.

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GENERAL

It is respectfully requested that a conference be granted before the office of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, at which time the taxpayer's representatives will submit such additional data as may be required.

This brief is not filed for the purpose of delay.

Respectfully submitted,

H W Johnson

Agent for Hon. A. W. Mellon

STATE OF PENNSYLVANIA,)
) ss:
County of Allegheny.)

Before me, the undersigned authority, personally appeared H. M. JOHNSON, who, being duly sworn according to law, deposes and says that he is Agent for Hon. A. W. Mellon and that the statements set forth in the foregoing Protest and Brief are true and correct as he verily believes.

H. M. Johnson

SWORN to and subscribed before me
this VI day of June, 1928.

M. V. Andrews,
Notary Public.

My commission expires:
M. V. ANDREWS, Notary Public
MY COMMISSION EXPIRES
January 20th, 1929

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STATEMENT BY ATTORNEY

The foregoing Protest and Brief has been prepared under my supervision. To the best of my knowledge and belief the statements made therein are true and correct.

W. A. Leffek
Atty

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "EE", being a certified photostatic copy of protest and brief to Hon. D. H. Blair, Commissioner of Internal Revenue, submitted by D. J. Hicks, agent for R. B. Mellon, executed June 21, 1928.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "EE".

(Page 506 a.)

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON, D. C.

RECEIVED
JUN 21 1928
Internal Revenue Agt
PITTSBURGH

In the Matter

of

The audit of the income tax returns filed by MR. R. B. MELLON, 6500 Fifth Avenue, Pittsburgh, Pennsylvania, for the calendar years 1924 and 1925.

Revenue Agent's Report Dated Feb. 23, 1928.
Letter of Transmittal Dated Mar. 20, 1928.

PROTEST AND BRIEF

HONORABLE D. H. BLAIR,
Commissioner of Internal Revenue,
Washington, D. C.

MR. W. P. MAYS,
Internal Revenue Agent in Charge,
Pittsburgh, Pennsylvania.

The letter of transmittal grants the taxpayer thirty days' time in which to file a protest. The time in which to file this protest was extended to June 21, 1928.

The above named taxpayer, Mr. R. B. Mellon, protests certain adjustments made by the Revenue Agent as set forth in his report dated February 23, 1928, which may be summarized as follows:

Ag1

1. The Revenue Agent determined that the taxpayer sustained a capital net loss of $337,461.54 in the year 1924 on the sale of 500 shares of the capital stock of the J. M. Guffey Company. The taxpayer submits that the deduction to which he is entitled on account of the sale of the said capital stock, which was collateral for a loan was $376,251.45, and that said amount is not subject to the capital gain or loss provisions of the Revenue Act of 1924.

2. The Revenue Agent determined that the taxpayer had a liquidating net capital profit in the year 1925 of $1,856,515.99 on the sale of the assets of A. Overholt & Company and West Overton Distilling Company and final distribution in liquidation. The taxpayer submits that the Revenue Agent erroneously included in the said liquidating profit $489,724.67 which is alleged to be profit on the disposal of the capital stock of A. Overholt & Company, a corporation.

Point 1.

On page five of the Revenue Agent's Report it is stated that the proportionate part of $58,198.61, being taxes paid by Hon. A. W. Mellon and Mr. R. B. Mellon on the properties owned by J. M. Guffey Company was not an allowable deduction for the reason that it was the equivalent of an advance or loan to the company. He therefore disallowed one-half of this amount, or $29,099.30, being the taxpayer's proportionate part. Likewise the said individuals paid taxes on the said properties for the year 1923 in the amount of $52,052.50. The Commissioner of Internal Revenue deemed that to be in effect a loan to the said company and disallowed as a deduction from gross income of the taxpayer one-half of the said amount or $26,026.25, being the taxpayer's proportionate part. In 1924

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there was also paid for and in behalf of the Guffey Company interest in the amount of $3,047.42 on loan of Mr. Guffey on the insurance policies, which amount should also be added to the Revenue Agent's figures.

The taxpayer agrees with the findings of the Revenue Agent that the taxes paid for the company were not allowable deductions under the heading "Taxes Paid" and that the same were in effect loans made to the J. M. Guffey Company.

The net amount of loans made to the said company by the taxpayer and his brother, Hon. A. W. Mellon, as shown by the Revenue Agent on page eight of his report is $1,174,923.07. To this item should be added the taxes paid for the company and which the Commissioner and the Revenue Agent have determined to be additional loans, the amounts of $52,052.50 paid in the year 1923, and $58,198.61 paid in the year 1924; and interest payment of $3,047.42. This results in net loans made to the J. M. Guffey Company as of 1924 of $1,288,221.60.

These loans were secured by collateral of 1000 shares of the capital stock of J. M. Guffey Company and life insurance policies on the life of Mr. J. M. Guffey. The cash surrender value of these life insurance policies as of December 31, 1924, against which Mr. Guffey had borrowed money, was $86,509.00.

On or about December 30, 1924, Hon. A. W. Mellon and the taxpayer sold 500 shares of the capital stock of J. M. Guffey Company for which they received $250,000.00, which amount was applied against the loans made to the said Guffey. This left 500 shares of the capital stock of the said company and the life insurance policies as collateral for the balance of the loan.

The 500 shares of the said capital stock had a cash value on December 30, 1924 of $250,000.00 based on the selling price of 500 shares sold on that date, which amount together with the value of $86,509.00, less loan thereon of $50,790.30, on the life insurance policies results in a total value of $285,718.70 for the collateral.

Since the total net loans amounted to $1,288,221.60 less $250,000.00, proceeds from sale of part of the collateral, the balance of $1,038,221.60 was secured by collateral of the value of $285,718.70.

The taxpayer determined that the loans should be written down from $1,038,221.60 to the value of the collateral of $285,718.70 leaving a total amount of $752,502.90 which represents an ascertainment and determination of the partial worthlessness of the J. M. Guffey notes and the collateral thereon to bring the value of said notes on their books down to the actual value as of December 31, 1924. This write down is to be divided equally between Hon. A. W. Mellon and the taxpayer as the loans to the company were made jointly.

It can therefore be readily seen that this transaction is not one that involves the capital loss provision of the Revenue Act of 1924 and that the write down by the taxpayer on account of these loans is a deduction from income subject to both normal and surtax.

The following is a schedule showing the correct deduction determined by the taxpayer for the year 1924 on account of loans which were made to the said J. M. Guffey and on account of the sale of collateral securing said loans in the said year:

Net amount of loans as shown by Revenue Agent on page eight of his report,		$1,174,923.07
Taxes paid in 1924		58,198.61
Taxes paid in 1923		52,052.50
Interest paid on insurance policy in 1924		3,047.42
Total loans Dec. 30, 1925		$1,288,221.60
Less: Proceeds from sale of 500 shares capital stock of J. M. Guffey Co. held as collateral,		250,000.00
Balance of loans		$1,038,221.60
Value of remaining collateral:		
500 shares J.M. Guffey Co. stock	$250,000.00	
*Life insurance policies	35,718.70	285,718.70
Amount determinable and sustained in 1924		$ 752,502.90
Amount attributable to taxpayer, being one-half of the total amount,		$ 376,251.45
Cash surrender value of insurance policies Dec. 31, 1923		$ 82,712.00
Add premiums for 1924	$ 6,950.00	
Less dividends	3,153.00	3,797.00
Approximate cash surrender value of policies Dec. 31, 1924		$ 86,509.00
Less loans on policies		50,790.30
Value of policies on Dec. 31, 1924		$ 35,718.70

It is respectfully submitted that the amount of $376,251.45 is the correct amount of the deduction to which taxpayer is entitled in the year 1924 and that the same is a deduction from ordinary net income and is not subject to the capital gain or loss provision of the Revenue Act of 1924.

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Point 2.

The Revenue Agent determined that the taxpayer had a liquidating net capital profit in the year 1925 of $1,856,515.99 on the sale of the assets of A. Overholt & Company and West Overton Distilling Company and final distribution in liquidation. The taxpayer submits that the Revenue Agent erroneously included in the said liquidating profit $489,724.67 which is alleged to be profit on the disposal of the capital stock of A. Overholt & Company, a corporation.

On page 27 of the Revenue Agent's Report, Schedule No. 4-Q, the liquidating profit has been segregated by the Revenue Agent as follows:

A. Overholt & Company, Partnership,	$ 1,238,095.95
A. Overholt & Company, Corporation,	489,724.67
West Overton Distilling Company, Partnership,	128,695.37
Total liquidating profit	$ 1,856,515.99

The taxpayer does not dispute the liquidating profit as determined by the Revenue Agent in connection with the distribution in final liquidation of A. Overholt & Company and West Overton Distilling Company, partnerships, but respectfully submits that the alleged liquidating profit of $489,724.67 on A. Overholt & Company, corporation, is erroneous.

On December 30, 1918, A. Overholt & Company, partnership, and West Overton Distilling Company, partnership, took over all of the assets of the A. Overholt & Company, corporation, and West Overton Distilling Company, corporation, respectively.

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The businesses of these partnerships were conducted until December 3, 1919, when Mr. H. C. Frick, one of the partners, died, and from that time on the partnerships were in liquidation and in 1925 final distribution in liquidation was made.

Subsequently The Union Trust Company of Pittsburgh was appointed Liquidating Agent for the said partnerships.

The Revenue Agent has recommended that there be included in the income of the taxpayer for the year 1925 profit alleged to have been realized by him in the disposal of the capital stock of A. Overholt & Company.

As will be noted from the above history of the transaction all of the assets of the corporations were taken over by the partnerships on December 30, 1918. The Revenue Agent does not give any reason or explanation why he has included this alleged profit in the year 1925 and the taxpayer is at a loss to understand on what facts and conclusion of law he arrived at his conclusion.

It is respectfully submitted that there could be no profit or loss whatsoever to the taxpayer in the year 1925 in connection with the transfer of the assets of the corporations to the partnerships. This was a transaction that took place in 1918.

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GENERAL

It is respectfully requested that a conference be granted before the office of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, at which time the taxpayer's representatives will submit such additional data as may be required.

This brief is not filed for the purpose of delay.

Respectfully submitted,

O. W. Heinle

Agent for Mr. R. B. Mellon

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STATE OF PENNSYLVANIA,)
) ss:
County of Allegheny.)

Before me, the undersigned authority, personally appeared D. J. HICKS, who, being duly sworn according to law, deposes and says that he is Agent for Mr. R. B. Mellon and that the statements set forth in the foregoing Protest and Brief are true and correct as he verily believes.

D. J. Hicks

SWORN to and subscribed before me this 21st day of June, 1928.

M. V. Andrews
Notary Public.

My commission expires:
M. V. ANDREWS, Notary Public
MY COMMISSION EXPIRES
January 20th, 1929

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STATEMENT BY ATTORNEY

The foregoing Protest and Brief has been prepared under my supervision. To the best of my knowledge and belief the statements made therein are true and correct.

W. R. Seifert
atty.

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Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "FF", being a certified photostatic copy of claim for refund for $58,335.34 income tax for 1925, with additional sheets attached, filed by Andrew W. Mellon, Pittsburgh, Pennsylvania.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "FF".

(Page 508 a.)

Form 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June, 1930

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

COLLECTOR'S STAMP

[X] REFUND OF TAX ILLEGALLY COLLECTED.

[ ] REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

[ ] ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

STATE OF Pennsylvania }
COUNTY OF Allegheny } ss:

Name of taxpayer or purchaser of stamps ANDREW W. MELLON

Business address Pittsburgh, Pennsylvania.
(Street) (City) (State)

Residence

..... duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts below are true and complete:

1. District in which return (if any) was filed 23rd Pennsylvania
2. Period (If for income tax, make separate form for each taxable year) from Jan. 1, 1925 to Dec. 31, 1925
3. Character of assessment or tax Income Tax
4. Amount of assessment, $; dates of payment June 13, 1929
5. Date stamps were purchased from the Government
6. Amount to be refunded (or such greater amount as is refundable) $58,335.34
7. Amount to be abated (not applicable to income or estate taxes) $
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 1924, on June 13, 1932

The deponent verily believes that this claim should be allowed for the following reasons:

(Attach letter size sheets if space is not sufficient)

Sworn to and subscribed before me this 11th day of May, 1932

Signed H A Phillips
Agent for Andrew W. Mellon.

M. V. Andrews Notary Public.
(Signature of officer administering oath) (Title)

My Commission expires

(SEE INSTRUCTIONS ON REVERSE SIDE)

3—11704

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Claim No.

Character of assessment and period covered	List	Year	Month	Account No. on Page	Account No. on Line	Amount assessed	Paid, Abated, or Credited: Date	Paid, Abated, or Credited: Amount	Pd. Ab. Cr.
1925	4	1926	June	20		$ 1,260,641 72	2-15-26	$ 417,220 45	Pd
							6-15-26	211,260 50	"
							9-15-26	316,136 43	"
							12-15-26	316,136 43	"
1925	4	1929	June 2	18	1	18,906 45			
						Int. 9,428 89	6-13-29	61,235 24	"
						Total, $ 1,318,177 07	Total,	$ 1,318,177 07	

I certify that the records of this office show the following facts as to the purchase of stamps:

To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state: Serial number	If special tax stamp, state: Period commencing
					$		

J. W. Heiner
Collector of Internal Revenue.

721.
(District)

Claim examined by—

Claim approved by—

Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed... $

Amount allowed... $

Amount rejected... $

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

U. S. GOVERNMENT PRINTING OFFICE, 1929

9—11764

Defendant's Ex "FF" 10/29/34 H.T.

The partnerships of A. Overholt & Company and West Overton Distilling Company were completely liquidated and final distribution made of their assets to Messrs. A. W. and R. B. Mellon and the Frick Estate in 1925.

Messrs. A. W. and R. B. Mellon reported in their respective tax returns for each of the years 1920 to 1925, both inclusive, their proportionate part of the yearly operating net income or operating loss of the liquidating agent of said partnerships.

The Commissioner of Internal Revenue in the audit of the tax returns for the year 1925, determined that Messrs. A. W. and R. B. Mellon and the H. C. Frick Estate were taxable on their proportionate part of the entire net profit resulting from the liquidation of these partnerships determined by using the value as shown on the partnership books as of December 31, 1919, and the total net liquidating distributions made to the partners, less expenses. He included in said liquidating profit for 1925 the operating profits and operating losses for the years 1920 to 1925, both inclusive, which the taxpayers had included in their returns for each of said years. Under date of March 15, 1929, the taxpayer was advised by the Commissioner that there would be assessed an additional tax of $48,906.45 for the year 1925 and in June 1929, the Collector of Internal Revenue sent the taxpayer a notice and demand for the payment of said amount together with interest of $9,428.89, making a total of $58,335.34, which amount was duly paid pursuant to said notice and demand by the Collector.

Since the Commissioner's final determination that the liquidating profits in 1925 should include the operating profits of the liquidating agent for the years during which the partnerships were in process of liquidation, it followed that upon such determination the taxpayer erroneously included in his return the operating profits or losses for each of said years. Therefore, the taxpayer filed a claim for refund for the year 1920, requesting that refund be made of so much of the tax as resulted from the inclusion in his net income of the operating profit of A. Overholt & Company and West Overton Distilling Company.

The taxpayer, since refund claim was filed, received a letter from the Commissioner in which he advises that the taxpayer correctly reported the current profits of the liquidating agent during the period of liquidation and that he, the Commissioner, had erroneously included in taxable income in the year 1925, the operating profits and losses of said liquidating agent during the period of liquidation. Without admitting that the Commissioner was wrong in including said operating profits of the liquidating agent during the period of liquidation in 1925, the taxpayer, as a matter of protection against the running of the statute of limitations for said year 1925, files this claim for refund with the request that if it be finally determined

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that the Commissioner was wrong in including said liquidating profits during period of liquidation in the year 1925, that said amounts be excluded therefrom and refund made of the amount erroneously included in the Commissioner's final letter pursuant to which notice and demand was issued by the Collector and payment duly made pursuant to said demand.

The taxpayer has been informed that in the case of the H. C. Frick Estate the liquidating profits during the period liquidation were included in the liquidating profits in the year 1925, by the Commissioner, that the tax was paid as so found by the Commissioner and that said case has been finally closed on that basis.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "GG", being certified photostatic copy of claim for refund for $48,915.12 income tax for 1925, with statement attached, filed by Mr. Richard B. Mellon, Pittsburgh, Pennsylvania.

Mr. Booth:

No objection.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "GG".
(Page 510 a.)

Mr. Booth:

Plaintiffs admit that the books and records of the liquidating trustees of the former partnerships were kept on the accrual basis of accounting.

Mr. Eustace:

We object to the term "liquidating trustees".

Mr. Booth:

It is merely descriptive, as I used it.

The Court:

Well, of the particular persons named.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "HH", being a certified photostatic copy of revenue agent's report dated September 8, 1925, *in re* the income tax of Andrew W. Mellon for the year 1921.

Defendant's counsel stated said offer was made for the purpose of showing that in the year 1921 A. Overholt & Company sustained a loss, and each partner's distributive share of the loss for 1921 was $32,503.93, used in determining or making a computation of the net profit of the liquidation of A. Overholt & Company in 1925.

Mr. Booth:

If the Court please, we object to the introduction of any evidence tending to recompute the profit for 1925. The pleadings admit that the Commissioner in 1925 included the 1920 income in his computation of the profit, and it now stands upon the record with that admission. This will be an attempt to try the 1925

case in this case, which is not involved; the only question at issue involved in ths case is whether or not the 1920 income was also included in 1925, and on which the tax has been paid, that stands admitted. Now they switch their position again, and will attempt with this manner of proof to try the 1925 case and prove now that the 1925 tax was not overpaid, which is not in issue. When the 1925 refund claim is finally acted upon, that is when this matter is to be discussed. They have not averred that the 1925 income as computed by the Commissioner was not correctly computed, and they are attempting now to introduce evidence and then argue on that evidence that the Commissioner incorrectly computed the tax for the year 1925. It is entirely irrelevant, immaterial and incompetent. They cannot switch their position now contrary to the allegations in the pleadings.

The Court:

This, as I understand you, is the 1921 return?

Mr. Eustace:

It is the '21 return, which is referred to and alleged in the statement of claim has been treated by the Commissioner in a certain way each year between 1920 and 1925, and this is for the purpose of meeting that issue, if the Court determines it is material. We made the objection it was immaterial, and the Court admitted it over our objection, and if the Court does determine it is material, we want this proof to show that the taxpayer has not been subjected to double taxation, which they allege in their statement of claim.

—LER'S COPY.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 144

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

PAUL MELLON, DAVID K. E. BRUCE, AND DONALD D. SHEPARD, EXECUTORS OF THE ESTATE OF A. W. MELLON, DECEASED

No. 145

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1937

CERTIORARI GRANTED OCTOBER 11, 1937

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26912—37

Mr. Booth:

In other words, this is an attempt by the then Collector to say that the Commissioner was wrong in computing the 1925 income, in computing the tax on it, before the Commissioner has taken any action and while his final determination still stands as admitted on the pleadings and in this record.

The Court:

We will overrule the objection for the present, and later rule upon it when we consider it.

That the purport and substance of said exhibit so offered and admitted in evidence, is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "HH".

(Pages 514 a-514 e.)

Defendant's Ex. "HH" 10/29/34

D-93.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH
3252-4

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
Pittsburgh DIVISION

September 8th, 1925.

In Re-- Andrew W. Mellon,
513 Smithfield St.,
Pittsburgh, Pa.

Examining Officer	Exam. Commenced	Exam. Completed	Time
C.E.Eastwood	August 31,1925	Sept. 8,1925	6 days

ALL COMPUTATIONS AND CALCULATIONS VERIFIED BY COMPTOMETER BY THE OFFICE OF REVENUE

Internal Revenue Agent in Charge,

Pittsburgh, Pa.

PROTESTED

An examination of the books and records of the above named taxpayer for the year 1921 discloses the following in regard to his income tax liability:

SUMMARY

Year	Additional Tax	
1921	$ [illegible]	Exhibit A.

Exemption Status:-- Head of family- (not needed).

Business:-- Secretary of the Treasury U.S.A. and financier.

Authority for Examination:-- In conjunction with [illegible] the trusteeship of JR. A.W. and R.B. Mellon.

Basis for Comparison: Retained copy of the original return.

The findings of this report [illegible] with Mr. E.M. Johnson, representing the taxpayer [illegible] decision.

L.B.J.

D-93

PITTSBURGH
SERIAL No. 3232

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
Pittsburgh....DIVISION

September 8th,1925.

In Re-- Andrew W. Mellon,
513 Smithfield St.,
Pittsburgh,Pa.

Examining Officer	Exam. Commenced	Exam. Completed	Time
C.E.Eastwood	August 31,1925	Sept. 8.1925	6 days

ALL COMPUTATIONS AND CALC... VERIFIED BY COMPTOMETER BY THE OFFICE OF REVENUE ...

Internal Revenue Agent in Charge,

Pittsburgh,Pa.

PROTEST

An examination of the books and records of the above named taxpayer for the year 1921 discloses the following in regard to his income tax liability:

SUMMARY

Year 1921

Exemption Status:— Head of family. (No[illegible]).

Business— Secretary of the Treasury [illegible]

Authority for Examination:— [illegible]

Basis for Computation: Retained copy of [illegible]

The findings of this report [illegible] with Mr. E.K. Johnson, representing the [illegible] decision.

163.

Defendant's Exhibit 10/29/34 d T.

D-94

A.W.Mellon.

The Schedule 2 to 2E inc., represent income from joint holdings of Messrs. A.W. and R.B.Mellon and is distributed in accordance to the ownership of the assets.

Reports have been filed on Partnerships, etc.

Respectfully submitted,

Clarence B. Eastwood,
Revenue Agent.

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TREASURY DEPARTMENT
Internal Revenue Service
Form 846 A—Feb., 1926

INDIVIDUAL

$2 95

Name A.W.Mellon

Schedule No. 1
Years 1921-~~1922-1923-1924~~
BLOCK ADJUSTMENTS

	Return	Assessed	Rejected	Corrected	Wyo's Items
1 Salaries	11788.29			11788.29	✓
2 Interest	611282.60			611282.60	✓
3 Partnerships etc.	(22315.31)	20225.26		(2092.05)	
4 Rentals	(327980.85)		19999.93	(327980.85)	✓
5					
6					
7 Sales	(75454.76)	214762.50		139307.74	✓ 136,769.01
8 Dividends	2866782.54			2866782.54	✓
9					
10 Misc. Income	9900.30		10731.00	(820.70)	✓
11	2985003.75	234987.76	30730.93	3289260.58	
12 Interest paid	426019.95			426019.95	✓
13 Taxes	101055.77			101055.77	✓
14					
15 Contributions	292305.05	1015.00		291290.05	✓
16					
17 Expenses	77389.97	1040.00		76349.97	
18	896770.74	2155.00		894715.74	
19	2196233.01			2404543.85	2,402,004.16
Net income subject to ordinary taxes					
Add: Capital					
Net gain					
Total income					

Wife's net gain or loss ..... $.....
Husband's net income or loss ..... $.....

P3

A.W.Mellon.

Schedule 1- A. Contd.

Line 3 Reported loss 23,315.31 Corrected as follows:

	Amended	Original.
West Overton Distilling	(10,087.52)	(10,[illegible].56)
O. Overholt and Co.	(32,505.83)	(32,[illegible].37)
J.R., A.W., and R.B.Mellon	39,459.48	19,[illegible].48
	(3,033.05)	(23,315.31)

accepted

See reports on the three organizations for details. The taxpayer included the 19,999.92 difference from J. R. A.W. and R.B. Mellon in Line 4 and this change is by a transfer from Line 4 to Line 3.

Schedule 1- B.

Line 4. Reported loss of 307,980.93 corrected loss.

	Original	Amended.
Rentals.:		
Joint Acct. Sch. 2.	36,766.30	36,766.30
W.L.Mellon # 2.	102.87	102.87
J.R., R.B. and A.W.Mellon	19,999.92	-0-
Other Properties	67,259.37	67,259.37
Total Rentals.	124,128.36	104,128.44

Contd.

[redacted]

911-8

The omitted portions of said Defendant's Exhibit "HH", together with the part set forth above, are also incorporated by reference and made part hereof, the original said exhibit in certified photostatic form having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibit be sent up in its original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "II", being a certified photostatic copy of revenue agent's report dated March 3, 1926, covering the years 1922 and 1923 of the income of the plaintiffs in these two actions.

Mr. Booth:

Same objection.

The Court:

Objection overruled for the present, and exception noted.

That the purport and substance of said exhibit so offered and admitted in evidence, is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "II".

(Pages 516 a-516 m.)

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PAGE

OFFICE OF
INTERNAL REVENUE AGENT IN [illegible]GE
PITTSBURGH DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

PITTSBURGH
SERIAL No. 819.2

ALL COMPUTATIONS AND CALCULATIONS
VERIFIED AS CORRECTED
BY THE OFFICE OF REVENUE AGENT IN CHARGE

IN RE: ANDREW W. MELLON,
Woodland Road,
Pittsburgh, Allegheny Co., Pa.

NOT PROTESTED

Pittsburgh, Pa.,
March 3, 1926.

Examining Officer	Examination Commenced	Examination Completed	No. Days
E. C. Shannon	January 11, 192[illegible]	March 3, 1926	20 days

Supervising Internal Revenue Agent,
Pittsburgh, Pa.

An examination of the books and records of the above-named individual for the years 1922 and 1923, disclosed the following in connection with his income tax liability:

SUMMARY

Years	Additional Tax	Form No.	Overassessment	Coll. Dist.
1922	None	1040	$913.39	23rd Pa.
1923	$1,536.14	1040	None	"
Totals			$913.39	
Net Overassessment	$13.39			
Net addl. Tax Assd	650.75			

Exemption Status - Head of a family; one dependent under eighteen years of age.

Business - Secretary of the Treasury of the United States.

Authority for Examination - Original returns for the years 1922 and 1923.

Basis for computation - Original returns for years 1922 and 1923, and the same are herewith returned.

Attention is called to the discrepancy between the income as shown on the returns and [illegible] The discrepancy is due to the fact that [illegible] Cash Receipt and Disbursement basis, and on the returns, is that which has been [illegible] current year - this [illegible] out the [illegible] years and will be [illegible] come which has been received by the taxpayer during current years and returned upon

[redacted]

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his books, and in doing so, he is reporting according to the law and regulations.

Income is derived from Salary - Interest on Bonds, Notes and Mortgages, Income from Fiduciary and Partnerships, Profits from Sales, Income from Rental Properties and Dividends on Stock.

The changes affecting the net income for the year 1922 are as follows: Decrease in Tax-Free Bond Interest, Increased Income from A. Overholt & Co. (Partnership) and Increases in Taxes Paid.

Changes for the year 1923 are as follows: Decrease in Tax-Free Bond Interest - Increase in Loss from A. Overholt & Co.(Partnership); Increase in Taxes Paid - Increased Income from Sale of Capital Net Gain and an error in listing the amount of Income Tax Paid at source taken as a deduction against taxes, as well as a change in said amount as per this report. The changes in this report have been discussed with H. M. Johnson, acting for Andrew W. Mellon, who approves same, and has signed Form 874, which is hereto attached.

(Signed) M. C. Shannon,
Internal Revenue Agent.

Inclosures:
Original returns for the years 1922 and 1923; Forms 1089 and 1000, [illegible] and Form 874.

9.12

SCHEDULE 1

Year 1922 ✓

Block Adjustments

	Return	Additions	Reductions	Corrected
Salary - U. S. Treasury Dept.	12,000.00			12,000.00 ✓
Income from Business, etc.	None			None
Interest on Bonds, 2% Tax-Free	116,464.22		19,733.33	96,730.89 ✓
Other Interest	510,793.81	19,733.33		530,527.14 ✓
Income from Partnerships, etc.				
Union Trust Co., Liquidating Agent - A. Overholt & Co.	16,548.11	2,935.07		19,483.18 ✓
West Overton Distilling Co. loss	10,655.46			10,655.46 ✓
J. R., A. W. & R. B. Mellon, Jr.	20,438.70	19,999.92		40,438.62 ✓
Rents & Royalties Loss	265,526.52		19,999.92	285,526.44 ✓
Profit from Sales loss	12,328.60			12,328.60 ✓
Dividends	2,604,683.97			2,604,683.97 ✓
Taxable Int. on Liberty Bnds.	1.46			1.46 ✓
Other Income				
Foreign Corporations	6,744.80			6,744.80 ✓
Sundry Refunds	3,133.33			3,133.33 ✓
Sale of Rights	44.10			44.10 ✓
Total Income	3,002,341.92			3,005,276.99
Losses by Fire, Storm, etc.	None			None
Interest Paid	363,705.39			363,705.39 ✓
Taxes Paid	101,063.02		5,551.18	106,614.20 ✓
Bad Debts	364,922.98			364,922.98 ✓
Contributions	116,440.18			116,440.18 ✓
Other Deductions				
Grace Contracting Co. 30,000.00				
Office Expense-Rents				
Salaries, etc. 86,521.71	116,521.77			116,521.77 ✓
Total Deductions	1,068,553.34			1,068,204.52
Net Income subject to Ord. Tax	1,939,688.58	42,668.32	45,284.43	1,937,072.47
Add: Cap. Net Gain	99,866.19			99,866.19 ✓
Total Income	2,039,554.77		2,616.11	2,036,938.66
Wife's Net Income or Loss	None			None

E 3

90 - 13

In re: ANDREW W. MELLON -2-

Schedule 1-1
Year 1922 - Form 1040

Explanation of Items

Item 1 - Income from Salaries
Salary reported $12,000.00 - Corrected $12,000.00

Schedule 1-2

Item 2 - Income from Business
Reported on return - None, Corrected - None.

Schedule 1-3

Item 3 - Interest on Tax-Free Covenant Bonds
Reported on return - $116,464.22, Corrected $96,730.89
The following items were included as tax-free Bond Interest and in accordance with available records the same are not tax-free.

[illegible] Permit (Joint Account $2500) 1/2 -	4,250.00
" " Personal (Broken Accts.)	15,000.00
[illegible]	120.00
[illegible] Club - Pittsburgh, Pa.	153.33
[illegible] of Allegheny County	210.00
[illegible]	19,733.33

Item 4 - Other Interest
Reported on return $510,793.81, corrected $530,527.14.
Same change is accounted for by the transfer of $19,733.33 from the Tax-Free Bond Interest Schedule to the Schedule of Other Interest.

Schedule 1-4

Item 4 - Income from Partnerships & Fiduciaries
Reported on return - A. Overholt & Co. $16,548.11 - Corrected $19,483.18
" " " West Overton Distilling Co. ($10,655.46) corrected ($10,655.46)
" " " J. R. - A. W. & E. B. Mellon (Trustees) $30,438.70, corrected $40,438.62

Income from A. Overholt & Co. is increased $2,935.07 in accordance with Revenue Agent's report on said partnership under date of February 24, 1925.
Loss from West Overton Distilling Co. $10,655.46.
No change is made in amount reported from the West Overton Distilling Co., the Revenue Agent's report under date of February 26, 1925, no change being made in said report.

90.-14

In re: ANDREW W. MELLON -3-

Schedule 1-4-cont.

Income from J. R. - A. W. & R. B. Mellon, Trustee - This item is increased $19,999.92 to agree with the amount as reported on the Fiduciary return, and the said amount is deducted from the amount as reported by the taxpayer as Cash Rental, under Schedule 1 - Item 5.

Schedule 1-5
Year 1922, Form 1040

Item 5 - Rents & Royalties -
As shown in Schedule No.1 - Item 5 - This item is increased $19,999.92, the same being transferred to Schedule 1 - Item 4-C - J. R., A. W. & R. B. Mellon, Trustee, to agree with amount as reported in Fiduciary return. See Schedule of Rental Property. Rates of depreciation as used in this Schedule of Rents are the same as used in previous reports and approved. The items of Other Expenses in Schedule consist of Interest - Taxes and Commissions. It will be noted in Schedule of Rents that items 1 to 45 inclusive are in connection with properties owned jointly by A. W. & R. B. Mellon.

Item 44 - Sundry - W. L. Mellon #3 are properties owned jointly by W. L. - A. W. & R. B. Mellon - 1/3 each.

Schedule 1-6

Item 6 - Profits from Sales - ($12,328.60 Loss)

Kind	Acquired	Cost	Sale Price	Profit or Loss
Liberty Bonds	1922	$25,973.20	$13,989.60	15.60
Crucible Steel Co. Stock	1920	75,125.00	50,810.00	12,316.00
Loss				12,328.60

Schedule 1-7

Item 7 - Dividends
Reported on return - $2,604,683.97, corrected $2,604,383.97

See Schedule of Dividends

Schedule 1-8

Item 8 - Taxable Interest on Liberty Bonds
Reported on return $1.46, corrected $1.46.

Schedule 1-9

Item 9 - Other Income

	Return	Corrected
Dividends - Foreign Corporations	6,764.80	6,764.80
Sundry Refunds	3,133.33	3,133.33
Sale of Rights	44.10	44.10
Totals	$ 9,942.23	$ 9,942.23

65

[redacted]

Item 11 - Losses by Fire, Burglary, etc.
Reported on return - [redacted]

[redacted]

Item 12 - Interest Paid
Reported on returns [redacted]

[redacted]

Item 13, Taxes Paid
Reported on returns [redacted]
Taxes - City, County & State [redacted]
Living Insurance not available.
[redacted]
returns, the record [redacted]

[redacted]

Item 14 - Bad Debts [redacted]
Reported on return [redacted]
Grace Contracting [redacted]
F.T.F. Lovejoy Note-uncollectable [redacted]
Total [redacted]
The Robert Grace Contracting Company of Fitchburg, [redacted]
was incorporated October 15, 1928, under the laws of [redacted]
Capital Stock of $100,000.00, allineed for cash, and A. W. [redacted]
owned jointly 600 shares @ $100.00 per share or $60,000.00, [redacted]
loaned said company the sum of $1,211,930.00 as will be [redacted]
by balance sheet of said company. On October 15, 1932, the [redacted]
Company liquidated, selling all the assets to the Miller-[redacted]
of this city, for $600,000.00 in cash - said cash being used to pay [redacted]
ferred creditors, and the said amount was not sufficient to pay [redacted]
debtedness as shown by balance sheet of said company as at December 31, [redacted]

Summary of Loss

Capital Stock - A. W. & R. B. Millon (1/2 each)		$60,000.00
A. W. Millon	$30,000.00	
R. B. Millon	30,000.00	
Balance of Joint Loan Indebtedness		$728,995.96
A. W. Millon	364,497.98	
R. B. Millon	364,497.98	

Balance Sheet as at December 31, 1921
Robert Grace Contracting Company
Pittsburgh, Pa.

ASSETS

Cash	1,281.84
Accounts Receivable	76,586.22
H. Kleinhaus Company	4,650.62
Bills Receivable	341,157.37
H. Kleinhaus Company	130,000.00
Interest in Advance	12,842.26
Stock of Domestic Corpns.	200,000.00
" " Sub Companies	5,000.00
H. Kleinhaus Company	95,000.00
Total Assets	866,518.31

LIABILITIES

Accounts Payable	22,081.01
Contr-Equip. & Supp. Co.	5,000.00
H. Kleinhaus Company	43.26
Bills Payable	1,311,900.00
Accrued Interest	613.34
Capital Stock	100,000.00
Surplus	623,119.30
Total Liabilities	866,518.31

D.-18

In re: ANDREW W. MELLON -7-

SCHEDULE 2
Year 1931 - Year 1040
Computation of Tax

Total Net Income subject to ordinary taxes		$1,937,078.47
Less Exemption	$2,400.00	
" Dividends	2,604,382.97	
" Taxable Interest on L. B.	1.46	2,607,084.43
Income subject to Normal Tax		None
Surtax on	$1,937,078.47	929,496.24
Tax on Cap. Net Gain	99,866.19 @ 12-1/2%	12,483.27
Total Tax		941,979.51
Less Tax withheld at source		1,336.62
Total Tax Assessable		940,642.89
Tax previously assessed		939,929.28
Overassessment		713.59

An exemption of $2,400.00 was taken on the original return and it should have been $2,400.00 as the net income exceeds $5,000.00 (section 216).

This error does not effect the final results as there is no income subject to Normal Tax.

Tax paid at source decreased $294.66 due to change in tax-free bond interest as shown in Schedule 1-3.

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In re: Andrew W. Mellon

90-33

Schedule 7

Year 1923
Block Adjustments

	Return	Additions	Reductions	Corrected
Salary U. S. Treasury Dept.	12,500.00			12,500.00
Income from Business	None			None
Interest on Bonds - 2% Tax - Free	94,066.10		19,880.00	74,186.10
Other Interest	718,719.75	19,880.00		738,599.75
Income from Partnerships, etc.				
Union Trust Co. liquidating Agent A. Overholt & Co.	11,682.10		2,718.39	14,400.49
West Overton Distilling Co.	9,938.12			9,938.12
J. R. A. W. & R. B. Mellon, Trustees	5,607.76	33,333.28		38,941.04
Rents	441,644.60		33,333.28	474,977.88
Profits from Sales	None			None
Dividends	4,796,852.48			4,796,852.48
Taxable Liberty Bond Interest	None			None
Other Income				
Foreign Stocks & Bonds	8,350.96			8,350.96
Underwriting Profit on Stock Ins.	1,740.41			1,740.41
Distribution Land Purchase Fund	5,434.41			5,434.41
Sundry Refunds	1,800.00			1,800.00
Total Income	5,181,807.05			5,179,088.66
Interest Paid	472,450.70			472,450.70
Taxes Paid (City, County State Luxury and Duty)	34,734.19		3,241.65	37,975.84
Losses by fire, storm, etc.	None			None
Bad Debts	1,857,367.09			1,857,367.09
J. M. Guffey Loans 1,855,566.67				
John H. Galey " 1,800.42				
Contributions	377,403.18			377,403.18
Other Deductions				
Office Expense-Rents & Salaries	64,511.42			64,511.42
Van Klack Lease	2,418.23			2,418.23
Miscellaneous	3,352.56			3,352.56
Premium on Bonds called	1,250.00			1,250.00
Total Deductions	2,813,487.37			2,816,729.02
Net Income subject to Ord.	2,368,319.68	53,213.28	59,173.32	2,362,359.64
Add: Capital Net Gain	159,594.64	47,380.00		206,974.64
	2,527,914.32	41,419.96		2,569,334.28
Wife's Net Income or Loss	None			None

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Schedule 7-1

Years 1924 - Form 1040

Explanation of Items

Item 1 - Income from Salaries
Salary reported $12,500.00 - corrected $12,500.00

Schedule 7-2

Item 2 - Income from Business
Reported on return, None - Corrected, None.

Schedule 7-3

Item 3 - Interest on Tax-free Covenant Bonds
Reported on return - $54,046.10, corrected $74,126.10
The following items were included as tax-free bond interest and in accordance with available records, the said items are not tax-free items:

Interboro Rapid Transit	$19,880.00
Hill School	[illegible]
University Club	[illegible]
Country Club of Allegheny County	[illegible]
Difference	[illegible]

Item 3-a - Other Interest
Reported on return $718,719.75, corrected $[illegible]
This change is accounted for by the transfer of $19,880.00 from tax-free bond interest schedule to schedule of other interest.

Schedule 7-4

Item 4 - Income from Partnerships and Fiduciaries

Reported on return -	A. Overholt & Co.	$11,[illegible]	Corrected $[illegible]
" " "	West Overton Dist. Co.	9,[illegible]	Corrected [illegible]
" " "	J. R., A. W. & R. B. Mellon (Trustees)	5,607.76	Corrected [illegible]

Loss from A. Overholt & Co., is increased $3,718.38 in accordance with Revenue Agent's report on said partnership under date of February 8, 1926.

Loss from West Overton Distilling Co., No change is made as per Revenue Agent's report under date of February 18, 1926.

Income from J. R., A. W. & R. B. Mellon - This item is increased $[illegible] to agree with the amount as shown on the Fiduciary return, and the said amount is deducted from the amount as reported by the taxpayer as cash rental under Schedule 7, Item 5 - Rents.

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In re: ANDREW W. MELLON

Schedule 7-B

Year 1923 - Form 1040

Item 5 - Rents & Royalties
Reported on return $441,644.60, corrected $474,977.88.
As shown on Schedule 7 - amount is transferred from Item 5 to Item 4-C (J. R., A. W. & R. B. Mellon, Trustee), to agree with the distribution as shown on the fiduciary return and upon which a report has been made. See Schedule of Rents.

The rates of depreciation as used in this schedule of rents are the same as used in previous reports, and were approved. The items of other income in schedules consist of Interest, Rents & Commissions. It will be noted in Schedule of Rents that items 1 to 45, inclusive, are in connection with properties owned jointly by A. W. & R. B. Mellon.

Item 46 - Rents - W. L. Mellon et. al. - properties owned jointly by W. L., A. W. & R. B. Mellon (1/3 each).

Schedule 7-C

Item 4 - Profits from Sales
Reported on return - None, Corrected - None.

Schedule 7-F

Item 4 - Dividends
Reported on return $6,770,000.00 - Corrected $6,770,000.00
See Schedule of Dividends.

Schedule 7-H

Item 6 - Bonds, Mortgage and Loans
Reported on return - None, Corrected - None.

Schedule 7-I

Schedule 7-12

Year 1923 - Form 1040

Item 12 - Taxes Paid

Reported on return $34,734.19, Corrected $37,975.84

The item of Taxes is made up as follows:

City, County and State	$17,150.95
Luxury Taxes as per list attached	17,590.94
Custom Duties	3,233.95
Total	37,975.84

The difference ($3241.65) accounted for as follows:

Customs duties paid as per vouchers 2276 and 2288	$3,233.95
Error in listing original taxes	7.70
	$3,241.65

Schedule 7-13

Item 13 - Losses by Fire, Storm, etc.

Reported on return, None, Corrected, None.

Schedule 7-14

Item 14 - Bad debts

Reported on return $1,857,287.09, Corrected $1,857,287.09

Summary	
J. R. Caffey	$1,856,566.67
John K. Caley	1,620.42
Total	1,857,287.09

See Schedule of Bad debts for full and complete explanation, [illegible] and a part of this report.

Schedule 7-15

[illegible] $37,975.18

See Schedule of Contributions.

Schedule 7-16

[illegible], Reported on return $84,811.42, Corrected

			$84,811.42
"	"	2,418.25	2,418.25
"	"	3,[illegible].58	3,[illegible].58
		1,[illegible].00	1,[illegible].00
[illegible]		[illegible].31	[illegible].31

-V7

9.37

SCHEDULE 8

Year 1923 - Form 1040

Computation of Tax

Total Net Income subject to ordinary taxes		2,362,359.64
Less - Exemption	2,400.00	
" Dividends	4,796,852.48	
" Interest on U. S. Obligations	-0-	4,799,252.48
Income subject to Normal Tax		None
Surtax on $2,362,359.64		1,152,139.82
Tax on Capital Net Gain ($206,974.64 @ 12-1/2%)		25,871.83
Total Tax		1,178,011.65
Less Tax withheld at source	1,483.72	
Less 25% reduction in taxes	294,502.91	295,986.63
Total tax assessable		882,025.02
Tax previously assessed		880,490.88
Additional Tax to be assessed		1,534.14

Attention is called to the fact that on the original return under the head of Computation of Tax, an error of $800.00 was made in the amount of income tax paid at source which was deducted from the total tax.

2% on $94,066.10, the amount of tax-free bond interest, originally reported is $1,881.32 instead of $1,081.32. It will be noted that on the corrected report the tax-free bond interest is reduced to $74,186.10 and the tax paid at source is $1,483.72.

117.97 8
9 2.97
88 491.87

528

The omitted portions of said Defendant's Exhibit "II", together with the part set forth above, are also incorporated by reference and made part hereof, the original said exhibit in certified photostatic form having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibit be sent up in its original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "JJ", for the same purpose, being a certified photostatic copy of the individual income tax return for 1922 filed by A. W. Mellon.

Mr. Booth:

Same objection.

The Court:

Objection overruled for the present, and exception noted.

Mr. Booth:

May it be understood, rather than cluttering up the record with my objections, that my objection runs to all of these exhibits for the same purpose?

The Court:

It may be so understood; and that the ruling will be in effect reserved, or the determination; and we will admit them for the present.

That the full purport and substance of said exhibit so offered and admitted in evidence is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "JJ".

(Pages 518 a-518 b.)

Form 1040
U. S. Internal Revenue
(Auditor's Stamp)

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000

OR SEPARATE RETURNS OF HUSBAND AND WIFE IF COMBINED NET INCOME EXCEEDS $5,000

FA

For Calendar Year 1922

Or fiscal period beginning ....., 1921, and ended ....., 1922

Do Not Write in These Spaces
SERIAL NUMBER
FILE CODE
FIRST PAYMENT $ 27.1
Examined by

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Period

(PRINT NAME AND ADDRESS PLAINLY BELOW)

A. W. Mellon

Woodland Road
(Street and number, or rural route)

Pittsburgh (Post office) Allegheny Pennsylvania

Cash Check M. O. Cert. of Ind.

OCCUPATION, PROFESSION, OR KIND OF BUSINESS: Secretary of the Treasury of the United States

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1921, to what Collector's office was it sent? Pittsburgh, Pa.
3. Is this a joint return of husband and wife? No
4. If not, is a separate return being filed by your husband or wife?
   If so, state: (a) Name and address entered as head of that return
   (b) Exemption claimed, $ 2,900.00
5. Were you married and living with husband or wife on the last day of your taxable period? Single
6. If not, were you on the last day of your taxable period supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption? One
7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable period?

INCOME

	Amount received	Expenses paid (Explain in Schedule G)	
1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received.)			
United States Government, Washington, D.C.	$ 12,000.00		$ 12,000 00
2. Income from Business or Profession. (From Schedule A)			None
3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	Corporation bonds 2% tax paid		116,464 39 510,795 51
4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)			
Union Tr.Co. of Pgh.,Liquidating Agt.,A.Overholt & Co,715 Frick Bldg			16,543 11
Do. Do. Heat, Light & Power Dist. Co,Scottdale			10,655 46
JR, AW, RB Mellon, Trustees, 514 Smithfield St., Pittsburgh, Pa.			20,428 72
(This last item will be reported on Form 1041 as $40,493.62 but $19,999,92 was paid to me in cash as rent and is in my schedule B)			
5. Rents and Royalties. (From Schedule B)			265,322 92
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			1,263 60
7. Dividends on Stock of Domestic Corporations			2,604,683 97
8. Taxable Interest on Liberty Bonds, etc. (From Schedule E)			1 86
9. Other Income (including dividends received on stock of foreign corporations). (State nature of income.)			
(a) Foreign Corporations			6,744 20
(b) Sundry refunds			2,133 55
(c) Sale of rights, Etc			44 20
10. TOTAL INCOME IN ITEMS 1 TO 9			3,959,688 53

DEDUCTIONS

11. Losses by Fire, Storm, etc. (Explain in Schedule F)	None	
12. Interest Paid	563,705 39	
13. Taxes Paid	101,065 02	
14. Bad Debts (Explain in Schedule G)	364,922 98	
15. Contributions. (Explain in Schedule G)	116,440 25	
16. Other Deductions Authorized by Law. (Explain in Schedule G)	116,521 77	
17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16		1,062,653 34
18. NET INCOME (Item 10 minus Item 17)		2,959,688 53

COMPUTATION OF TAX

19. Net Income (Item 18 above)		2,959,688 53	27. Normal Tax (4% of Item 26)	None
20. Less: Dividends (Item 7 above)	2604683 97		28. Surtax (from Schedule 2)	None
21. Taxable Interest on Liberty Bonds, etc. (Item 8 above)	1 86		29. Total (Item 27 plus Item 28)	940,804 29
22. Personal Exemption and Credit for Dependents	2900 00		30. Income and Profits Taxes (Item 9, Schedule D)	12,433 27
23. TOTAL OF ITEMS 20, 21, AND 22			31. Total Tax	953,237 56
24. Balance (Item 19 minus Item 23)		None	32. Less: Income and Profits Taxes paid at source (Item 10, Schedule D)	2,329 28
25. Amount taxable at 4% (not over $4,000)			33. Balance (Item 31 minus Item 32)	None
26. Balance taxable at 8% (Item 24 minus Item 25)			34. Total tax (Item 33 plus Item 32)	950,908 28

In computing tax for a fiscal year ending after June 30, 1922, and before January 1, 1923, see Section 210 (a) (2) of the Revenue Act of 1921.

MAR 14 1923

SCHEDULE A.—INCOME FROM BUSINESS OR PROFESSION. (See Instructions 2.)

1. Total sales from business or profession
Cost of Goods Sold:
2. Labor
3. Material and supplies
4. Merchandise bought for sale
5. Other costs (list principal items and amounts below or on separate sheet)
6. Plus inventory at beginning of year
7. Total (Lines 2 to 6, inclusive)
8. Less inventory at end of year
9. Net Cost of Goods Sold (Line 7 minus Line 8)

Gross amount of salary to be included in Item 10

Gross Business Deductions:
10. Salaries and wages (not reported on "Labor" on line 2 (see Instruction 1)) $
11. Rent on business property in which taxpayer has no equity
12. Interest on business indebtedness to others
13. Taxes on business and business property
14. Repairs, upkeep and loss, obsolescence, depletion, and property losses (explain below)
15. Bad debts arising from sales or professional services
16. Other expenses (list principal items and amounts below or on separate sheet)
17. Total (Lines 10 to 16, inclusive) $
18. Total Deductions (Line 9 plus Line 17) $ None
19. Net Income (Line 1 minus Line 18) (Enter as Item 2) $

Explanation of deductions claimed on Lines 5, 14, and 16

SCHEDULE B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5.)

1. Kind of Property.	2. Amount Received.	3. Cost, or Value March 1, 1913.	4. Depreciation and Depletion.	5. Repairs.	6. Other Expenses.	7. Net Income (Enter as Item 3)
Schedule attached	$	$	$	$	$	$

State estimated life of property and depreciation previously taken

SCHEDULE C.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6.)

1. Kind of Property.	2. Date Acquired.	3. Amount Received	4. Depreciation.	5. Cost.	6. Value March 1, 1913.	7. Subsequent Improvements	8. Net Profit (Enter as Item 4)
Liberty bonds	Jan 1922	$2,959 60		$2,973 20			13 60
Capital stock	Dec 1920	59,510 00		72,125 00			12615 00

If not acquired by purchase, state how acquired

SCHEDULE D.—CAPITAL NET GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional, see Instruction 4.)

1. Kind of Property.	2. Date Acquired.	3. Date Sold.	4. Amount Received.	5. Depreciation.	6. Cost.	7. Value March 1, 1913.	8. Subsequent Improvements and Depreciation.	9. Net Gain (after Tax of 12½ as Item 20)
		Agreement 1919 Settled	$		$	$	$	$
Capital [redacted]		Sept '22	443697 60		343351 41			99366 19

If not acquired by purchase, state how acquired

SCHEDULE E.—TAXABLE INTEREST ON LIBERTY BONDS, ETC. (See Instruction 8.)

1. Obligations of the United States Issued Since September 1, 1917. (Wholly exempt from normal tax, but subject to surtax or taxation over exemptions specified.)	Exemptions. (Aggregate Principal Amount.) 2. $30,000.	3. $25,000.	4. $5,000.	5. Principal Amount in Excess of Exemptions Specified in Columns 2, 3, and 4.	6. Interest on Principal Amount in Excess of Exemptions.
(a) First Liberty Loan Second Converted 4½% Bonds	$	$	$	$	$
(b) First and Second, 4's, and First, Second, Third, and Fourth 4½'s	NONE				
(c) Treasury 4½% Bonds, Treasury Certificates, Treasury and War Savings Certificates	NONE	NONE			
(d) Victory Liberty Loan 4½% Notes, and Treasury Notes	NONE	NONE	NONE		1 46
(e) Total Taxable Interest (If you have bought or sold during the year attach statement showing holdings by periods). (Enter as Item 8)					$

SCHEDULE F.—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 11.)

1. Kind of Property.	2. Cost, or Value March 1, 1913.	3. Depreciation previously Taken.	4. Salvage Value.	5. Insurance.	6. Net Loss. (Enter as Item 11)
	$	$	$	$	$

SCHEDULE G.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 5, 14, 15, AND 16.

#14, Half the debt of Robt. Grace Contracting Co. (balance in R B Mallon's return) $364,497.98

Half the loss on note F.T.F. Lovejoy, uncollectable (Do.) 425.00

#16, Office expenses, salaries, rents, legal expenses, Etc. $ 86,521.77

Investment in Robt. Grace Contracting Co. [illegible] cancelled 30,000.00

Affidavit.

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made [illegible] for the taxable period stated, pursuant to the Revenue Act of 1921 and the Regulations issued thereunder, thereof.

(Signature of individual or agent.)

Sworn to and subscribed before me this 12 day of March, 1923.

(Signature of officer administering oath.)

(Address of individual or agent.)

(Official title.)

(Name of taxpayer.)

B 2

Thereupon defendant's counsel offered in evidence, separately, duly certified photostatic copies of original individual income tax returns as follows:

1. Income tax return filed by A. W. Mellon for 1923, marked Defendant's Exhibit "KK".
2. Income tax return filed by A. W. Mellon for 1921, marked Defendant's Exhibit "LL".
3. Income tax return filed by Richard B. Mellon for 1921, marked Defendant's Exhibit "MM".
4. Income tax return filed by Richard B. Mellon for 1922, marked Defendant's Exhibit "NN".
5. Income tax return filed by Richard B. Mellon, with schedules attached, for 1923, marked Defendant's Exhibit "OO".

Which said Exhibits "KK", "LL", "MM", "NN", and "OO" so offered and admitted in evidence are in words and figures as follows (The schedules containing itemization of rents, royalties, charitable contributions and explanations of losses claimed as arising out of transactions with one Guffey are here omitted):

915

Defendant's Exhibit "KK".

(Pages 521 a, 521 b, 521 c.)

Defendant's Exhibit "LL".

(Page 522.)

Defendant's Exhibit "MM".

(Pages 523 a, 523 b, 523 c.)

Defendant's Exhibit "NN".

(Pages 524 a, 524 b.)

Defendant's Exhibit "OO".

(Pages 525 a, 525 b, 525 c.)

INDIVIDUAL INCOME TAX RETURN

For the Calendar Year 1922

Pittsburgh, Pa.

Yes — No

(b) Exemption claimed, $ 2,400.00

Yes

One

INCOME

	Amount received.	Expenses paid. (Explain in Schedule G.)	
Treasury Department - U. S. Government			12,500
Income from Business or Profession. (From Schedule A)			
Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds			94,066.10
Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)			718,719.75
Union Tr.Co. Liquidating Agts., A.Crawhall & Sons, 713 Penn. Bldg., Pgh., Pa.			11,682.10
Union Tr.Co. Liquidating Agts. Kept Overseas Knitting Co., Hostdale, Pa.			9,938.18
[illegible] (This item is reported on Form 1041 on which tax of [illegible] is included below)			
Interest on Bonds, Notes and other interest-bearing obligations received by me from month to month) (From Schedule B)			[illegible]
Profits from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			[illegible]
Dividends on Stock of Domestic Corporations			None
Taxable Interest on Liberty Bonds, etc. (From Schedule E)			4,796,862.48
Dividends (and interest received on stock of foreign corporations). (State nature of income.)			None
[illegible] foreign stocks and bonds			8,350.26
[illegible] -on stock issue			1,740.11
[illegible] & land purchase fund			5,454.81
[illegible] refunds			1,800
TOTAL INCOME BY ITEMS 1 to 9			5,161,897.80

DEDUCTIONS

Interest Paid	472,460.70
Taxes Paid	34,734.19
Losses by Fire, Storm, etc. (Explain in Schedule F)	None
Bad Debts. (Explain in Schedule G)	1,857,367.09
Contributions. (Explain in Schedule G)	377,465.18
16. Other Deductions Authorized by Law. (Explain in Schedule G)	71,832.21
TOTAL DEDUCTIONS BY ITEMS 11 TO 16	2,813,859.37
NET INCOME (Item 10 minus Item 17)	2,348,038.43

COMPUTATION OF TAX

Net Income (Item 18 above)		2,348,038.43	22. [illegible] of Item 21)		
Dividends (Item 7 above)	4796,862 48		23. [illegible] of Item 22)		None
Taxable Interest on Liberty Bonds, etc. (Item 8 above)	None		24. [illegible]		
Personal Exemption and Credit for Dependents (see Instruction 22)	2,400 00		25. Tax on [illegible] Gain (25% of column 8, Schedule D)		1,166,119
[illegible] or Items 20, 21, and 22		4,799,262 48			
[illegible] 19 minus Item 23)		None			
[illegible] at 4% (not over $4,000)		None			
[illegible] 8% (from [illegible])		None			

[illegible] return must be marked "[illegible]" at top of [illegible]

SCHEDULE A.—INCOME FROM [illegible] OR PROFESSION. (See Instruction 2.)

		Other Itemized Deductions:	
		10. Salaries and wages not reported as "Labor" on line 2 (see Instruction 1)	
		11. Rent on business property in which taxpayer has no equity	
		12. Interest on business indebtedness to others	
		13. Taxes on business and business property	
		14. Repairs, wear and tear, obsolescence, depletion, and property losses (explain below)	
		15. Bad debts arising from sales or professional services	
		16. Other expenses (list principal items and amounts below or on separate sheet)	
		17. TOTAL (Lines 10 to 16, inclusive)	
		18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
		19. NET INCOME (Line 1 minus Line 18) (Enter as Item 2)	None

State amount of salary to self included in Item 10 $

Explanation of deductions claimed on Lines 5, 14, and 16

SCHEDULE B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5.)

1. KIND OF PROPERTY.	2. AMOUNT RECEIVED.	3. COST, OR VALUE MARCH 1, 1913.	4. DEPRECIATION AND DEPLETION.	5. REPAIRS.	6. OTHER EXPENSES.	7. NET INCOME (Enter as Item 3).
See attached schedule						

State estimated life of property, and depreciation previously taken

SCHEDULE C.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. AMOUNT RECEIVED.	4. DEPRECIATION.	5. COST.	6. MARKET VALUE MARCH 1, 1913.	7. NET AMOUNT REMAINING.	8. NET PROFIT (Enter as Item 4).
None							

If acquired by purchase, how acquired

SCHEDULE D.—CAPITAL GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional. See Instruction 6.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. AMOUNT RECEIVED.	4. DEPRECIATION.	5. COST.	6. MARKET VALUE MARCH 1, 1913.	7. NET AMOUNT REMAINING.	8. NET PROFIT (Enter as Item 5).
See attached							

If not acquired by purchase, how acquired

SCHEDULE E.—TAXABLE INTEREST ON LIBERTY BONDS, ETC. (See Instruction 8.)

1. KIND OF BONDS OR NOTES OF THE UNITED STATES (INCLUDING CERTIFICATES OF INDEBTEDNESS AND CERTIFICATES OF DEPOSIT ISSUED TO BUREAU.)	2. EXEMPTIONS APPLICABLE FROM PROVISIONS OF TAXABLE PERIOD TO JULY 2, 1919.	3. AMOUNT OWNED TO JULY 2, 1919, IN EXCESS OF EXEMPTIONS SPECIFIED IN COLUMN 2.	4. INTEREST TO JULY 2, 1919, ON AMOUNT OWNED IN EXCESS OF EXEMPTIONS.	5. EXEMPTIONS APPLICABLE FROM JULY 2, 1919, TO END OF TAXABLE PERIOD.			
(a) First Liberty Loan Second Converted 4½% Bonds	$50,000			XXXXXXX	XXXXX	XXX	XXXXX
(b) Liberty 4% and 4½% Bonds, Treasury 4½% Bonds, Treasury Certificates, and Treasury (War) Savings Certificates	5,000			$5,000			
(c) Treasury 4% and 4½% Bonds	125,000			$0,000			
(d) Treasury 4½% Notes, and Treasury Notes	NONE			NONE			
TOTAL TAXABLE INTEREST (If you bought or sold during year, attach statement showing holdings by periods)				(Enter total of columns 4 and 7 as Item 9)			

SCHEDULE F.—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 12.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. COST, OR VALUE MARCH 1, 1913.	4. SUBSEQUENT IMPROVEMENTS.	5. DEPRECIATION.	6. INSURANCE.	7. SALVAGE VALUE.	8.
None							

SCHEDULE G.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 15, AND 16.

Salary deductions - None. #14. See attached schedule. #15. See attached schedule. #16. None.
Salaries of clerks, rents of offices and sundry office expenses.

AFFIDAVIT

[illegible] this return, including the accompanying [illegible] and statements [illegible] examined by me, and, to the best of my knowledge and belief, is made in good faith, for the taxable period [illegible] 1921 and the Regulations issued under authority thereof.

(Signature of individual or agent.)

(Address of individual or agent.)

Subscribed before me this 11th day [illegible]

[illegible]

A. W. MELLON

...THAN TWO YEARS.

										7. Value March 1, '13	9. Net Gain
										$	$
											2,134.10
										1,325,155.00	41,165.00
										—	51,210.00
										—	215,799.40
											$ 297,669.50
											$168,934.75
Stock											24.51
Stock										194,[illegible].00	91,[illegible].00
Stock										278,[illegible].00	47,[illegible].00
Real Estate											[illegible]


347
Do not write in this
FIRST PAYMENT
Cashier's Stamp
23rd PENNSYLVANIA
Carried as above district
Secretary of the Treasury, United States.
Agreement

Form 1040
U. S. Internal Revenue

IF RETURN BEING FILED FOR CALENDAR YEAR 1921 FILE IT WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1922

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

INDIVIDUAL INCOME TAX RETURN

FOR CALENDAR YEAR 1921

305876

Or for period beginning _____, 1920, and ended _____, 1921

PRINT NAME AND ADDRESS PLAINLY BELOW

RICHARD B. MELLON. (Name.)

6500 FIFTH AVENUE. (Street and number or rural route.)

23rd PENNSYLVANIA

PITTSBURGH, PA. (Post office.) (County.) (State.)

OCCUPATION, PROFESSION, OR KIND OF BUSINESS BANKER.

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me and is a true and complete return made in good faith, for the taxable period stated, pursuant to the Revenue Act of 1921.

Sworn to and subscribed before me this third day of March, 1922.

D. Hilton Evans
Notary Public.

Richard B. Mellon
(Signature of taxpayer.)

6500 Fifth ave., Pittsburgh, Pa.
(Address of taxpayer.)

1. Are you a citizen or resident of the United States? YES

2. If you filed a return for 1920, to what Collector's office was it sent? PITTSBURGH, PA.

3. Is this a joint return of husband and wife? NO

4. If not, is a separate return being filed by your husband or wife? YES — If so, state: (a) Name and address entered at head of that return JENNIE K. MELLON, 6500 FIFTH AVE., PITTSBURGH, PA. (b) Exemption claimed, $ 2400.00

5. Were you married and living with husband or wife on the last day of your taxable period? YES

6. If not, were you on the last day of your taxable period supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption? ----

7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable period? ----

Line No.	Schedule (page 2)	INCOME.	Amount received.	Expenses paid.	
13	C	1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received.) SEE SCHEDULE ATTACHED.	$	$	8,145.33
		2. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds			213,295.02
14		3. Income from Partnerships, Fiduciaries, etc. (State name and address of partnerships, etc.) SEE SCHEDULE ATTACHED.			1089
17	C	4. Profit (or loss) from Sale of Real Estate			
18	D	7. Profit (or loss) from Sale of Stocks, Bonds, etc SEE SCHEDULE ATTACHED.			
		8. Dividends on Stock of Domestic Corporations			
19	E	9. Taxable Interest on Liberty Bonds, etc.			
20		10. Other Income (including dividends received on stock of foreign corporations). (State nature of income.) (a) Divid.on Foreign Stks.$6318.50-Liquid.Divid.$750.00-Profit on Note written off $75.00-Percentage Cost Adj.account $			7,143.85
		(b) Leased ground $575.00 - Miscellaneous $			
		(c)			
		11. TOTAL INCOME IN ITEMS 1 TO 10 (less losses shown therein, if any)			
		DEDUCTIONS.			
21		12. Interest Paid (not including interest deducted above)			18,33
22		13. Taxes Paid (not including taxes deducted above)			
23	F	14. Losses by Fire, Storm, etc.			
24	G	15. Contributions SEE SCHEDULE ATTACHED $109,929.86			75,000.00
25	G	16. Bad Debts (not including bad debts deducted above)			
26	G	17. Other Deductions Authorized by Law Business Expense-Salaries, Offices Traveling Exp., etc.			
		18. TOTAL OF ITEMS 12 TO 17			
		19. NET INCOME (Item 11 minus Item 18)			

COMPUTATION OF TAX.

20. Net Income (Item 19 above)	1,051,424.45	$ 426,604.25	30. Normal tax (4% of Item 26)
21. Less: Dividends (Item 8 above)			31. Normal tax (8% of Item 27)
22. Taxable Interest on Liberty Bonds, etc. (Item 9 above)			32. Surtax on Item 28 (see Instruction 6)
23. Personal Exemption and Credit for Dependents			33. TOTAL TAX
24. TOTAL OF ITEMS 21, 22 AND 23	1,051,424.45		34. Less [illegible]
25. Balance (Item 20 minus Item 24)	$ NONE		35.
26. Amount taxable at 4% (not over $4,000)	NONE		36. Balance due (Item 33 minus Items 34 and 35)
27. Balance taxable at 8% (Item 25 minus Item 26)	$ NONE		37. Amount of tax paid when filing return

Checks and drafts will be accepted only if payable at par.

11

[redacted] - SALARIES, WAGES, ETC.

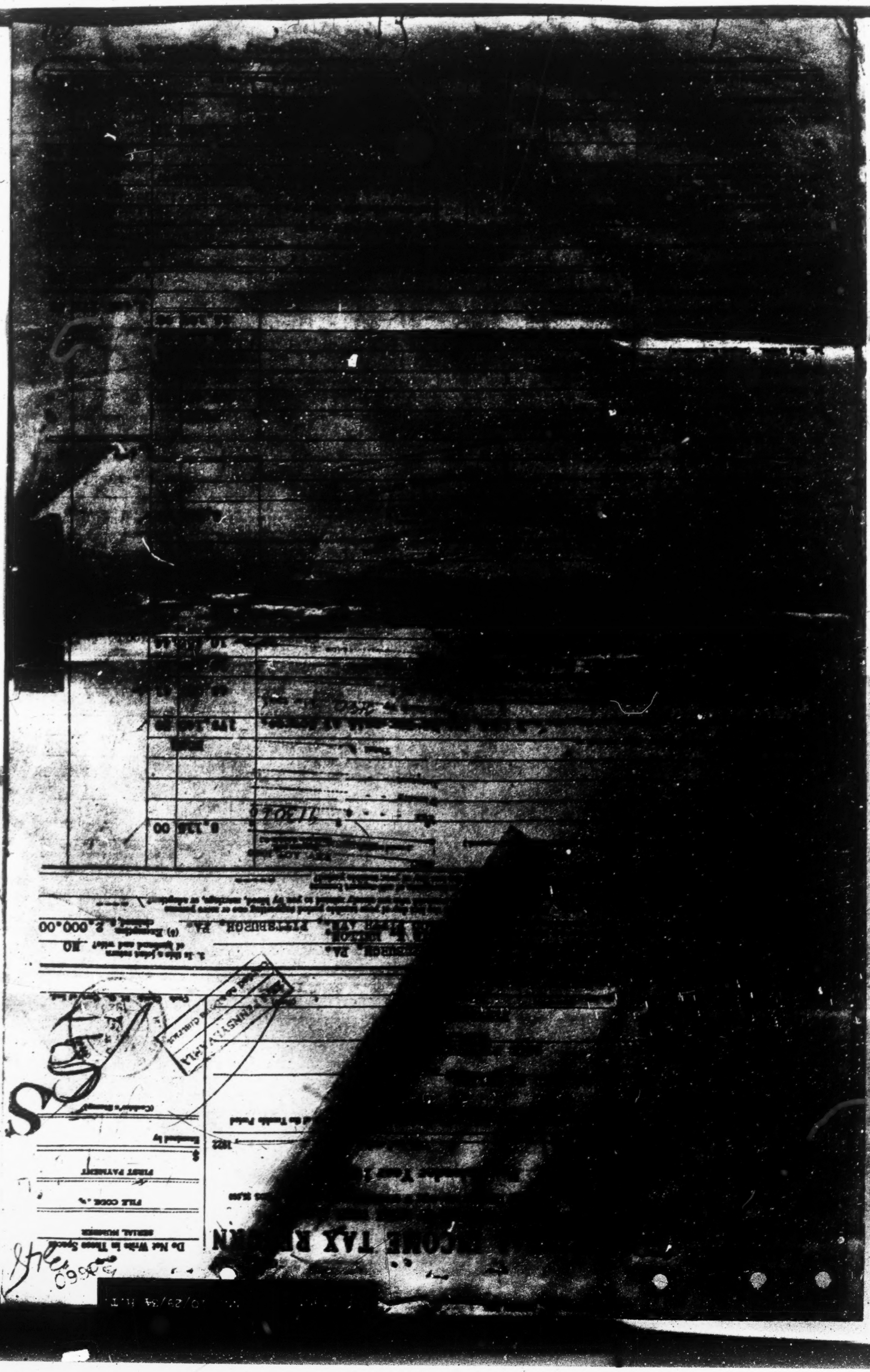
			Amount.
[redacted] Co. of America,	Pittsburgh, Pa.	- Director	$ 5,000.00
Federal Reserve Bank,	Pittsburgh, Pa.	- Director	30.00
Pittsburgh Coal Co.,	Pittsburgh, Pa.	- Director	100.00
Pennsylvania Water Co.,	Wilkinsburg, Pa.	- Director	5.00
A. Overholt & Co.,	Pittsburgh, Pa.	- Managing Partner.	208.33
Union Trust Co. of Pgh.,	Pittsburgh, Pa.	- Director,	500.00
Gulf Oil Corporation,	Pittsburgh, Pa.	- Director,	100.00
Union Savings Bank,	Pittsburgh, Pa.	- Director,	200.00
Mellon National Bank,	Pittsburgh, Pa.	- Director,	200.00
			$ 6,343.33
Ligonier Valley R.R.Co.,	Ligonier, Pa.	- Secretary.	1,800.00
			$ 8,143.33

a 3

[redacted]

[redacted]

[redacted]



Form 1040
U. S. Internal Revenue

INDIVIDUAL INCOME TAX RETURN

FOR THE CALENDAR YEAR 1923 OR FISCAL YEAR BEGINNING 1923

Do Not Write in These Spaces
SERIAL NUMBER

FILE CODE 348

FIRST PAYMENT
$ 4161.51

Examined by

Collector's Office, Int. Rev. Dist. Pa.

Cash Check M. O. Cert. of Int.

2045
TAX LIABILITY
INCREASED
PENALTY
TAX LIABILITY
REDUCED
ASSESSMENT
FOR
ASSESSMENT
INTEREST
ASSESSMENT
ON ACCT

FA

PAYMENTS

	8,370.00

(See Section 2.)

...reported as "Labor" on line 2		
...taxpayer has no		
...to others		NONE.
...and business property		
...from sales or professions' services		
...(no principal items must amounts below		
... (Lines 12 to 16, inclusive)		
... (Lines 8 plus Line 17)		
... (Line 7 minus Line 18) (Enter as Item 7)		

...RENTS AND ROYALTIES. (See Instruction 5.)

...	3. Cost or Value March 1, 1913.	4. Depreciation and Depletion.	5. Repairs.	6. Other Expenses.	7. Net Income (Enter as Item 4).
					49879.44

...PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6.)

1. ...	2. Date Acquired	3. Amount Received.	4. Depreciation.	5. Cost.	6. Value March 1, 1913.	7. Subsequent Improvements.	8. Net Profit (Enter as Item 6).
							49656.75

...CAPITAL NET GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional, see Instruction 4.)

...	2. Date Acquired	3. Amount Received.	4. Depreciation.	5. Cost.	6. Value March 1, 1913.	7. Subsequent Improvements.	8. Net Gain (Enter as Item 5)
							251187.25

...	2. Amount Value March 1, 1913	3. Amount Received	4. Amount Value March 1, 1913	5. Amount Received	6. Amount Value March 1, 1913	7. Amount Received	8. Amount Value March 1, 1913
...	$50,000	NONE	NONE	xxxxxxxx	xxxxxx	xxx	xxxxxx xxx
...	5,000			25,000			
...	200,000			50,000			
	TOTAL			TOTAL			

(Enter total of columns 4 and 7 as Item 9.)

...EXPLANATION OF LOSSES BY FIRE, STORMS, ETC. (See Instruction 12.)

...	2. Date of Value March 1, 1913	3. ...	4. ...	5. Insurance.	6. Salvage Value.	7. Net Loss (Enter as Item 8.)
		NONE	NONE			

...EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 15, AND 16.

AFFIDAVIT.

I swear (or affirm) that ... accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete ... for the period as stated, pursuant to the Revenue Act of 1921 and the Regulations issued under authority thereof.

(If return is made by agent, the sworn ... must be entered on this line.)

Sworn to ... this ... day of ..., 1922.

Richard B. Mellon
6500 Fifth Ave., Pittsburgh, Pa.

SCHEDULE "D" - CAPITAL NET GAINS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS.

Kind of Property	Date Acquired	Date Sold	Amount Received	Depreciation	Cost	Value 3/1/13.	Subsequent Improvements.	Net Gain.
Stock,-Am. Pitts.Co.	1915	1925	40,700.00	———	100,000.00			[illegible]
Bonds-Am.Pitts.Co.	———	1925	1,207,500.00	———		1,226,125.00		[illegible]
Stock-Equipment Co. Agreement	1915	1925	1,208,125.00		697,975.20			[illegible]
Real Estate	1900	1925	27,700.00	4,070.90	25,000.00		[illegible]	[illegible]
A.W. MELLON AND R.B. MELLON JOINT OWNERS OF ABOVE.			$ 2,544,925.00	4,070.90	1,018,975.20	[illegible]	[illegible]	[illegible]
R.B. MELLON'S ONE-HALF.			$ 1,272,462.50	2,035.45	509,487.60	613033.50	1408.72	105904.75
Stock,-Acheson	1905	1925	200,000.00			168550.00		2445.00
Stock,-Carborundum	1905	1925	225,000.00			272550.00	(Loss	47500.00
Stock,-B.P.S.& T.	1921	1925	10,800.00		7,762.50			3037.50
Stock,-H.H.Gum Co.	1905	1925	100.00		100.00			00.00
			$1,709,471.80	2,035.45	517,350.10	1054237.50	2817.45	151127.25

C10

The omitted portions of said Defendant's Exhibits "JJ", "KK", "LL", "MM", "NN" and "OO", together with the parts set forth above, are also incorporated herein by reference and made part hereof, the original said exhibits in certified photostatic form having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibits be sent up in their original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "PP", being certified photostatic copy of revenue agent's report dated September 10, 1925, submitted by Clarence B. Eastwood, revenue agent, *in re* Richard B. Mellon for the year 1921.

That the full purport and substance of said exhibit so offered and admitted in evidence is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "PP".

(Pages 526 a-526 e.)

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH
REPORT No. 3253

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
Pittsburgh...Division

Sept. 10,1925.

In Re-- Richard B. Mellon,
514 Smithfield St.,
Pittsburgh,Pa.

Examining Officer	Exam. Commenced	Exam. Completed	Time
C. B. Eastwood	Sept. 8,1925	Sept. 9,1925	2 days

ALL COMPUTATIONS AND CALCULATIONS VERIFIED BY COMPTOMETER BY THE OFFICE OF REVENUE AGENT IN CHARGE

Internal Revenue Agent in Charge,

Pittsburgh,Pa. PROTESTED

An examination of the books and records of the above named Individual for the years 1921 discloses the following in regard to his Income Tax Liability:

Summary

1921 Overassessment $ 474.15

Exemption Status:-- All taken by Mrs. Jennie K. Mellon.

Business:-- Banker and financier.

Basis for Comparisnn:-- Retained copy of Original Return together with Photostat for 1921.

Authority for Examination:-- 1921 Photostat.

Remarks: -- For details of amounts referred to in this report as Joint Account, see Schedule 2 to 2-E inclusive attached to report of Andrew W. Mellon, brother of the taxpayer.

L B.J.

R. B. Mellon.

The findings of this report have been discussed with Mr. Geo. Ashplund representing the taxpayer who withholds decision.

Reports have been filed on Partnerships etc.

Respectfully submitted,

Clarence B. Eastwood,
Revenue Agent.

E2

TREASUE DEPARTMENT
INTERNAL VENUE SERVICE
Form 876 A—Feb., 1925

INDIVIDUAL

Name R. B. Mellon

Schedule No. 1

Years 1921-~~1922-1923-1924~~

BLOCK ADJUSTMENTS

	Return	Additions	Reductions	Corrected	(Wife's Income)
1 Salaries.	8,143.33 ✓	✓		8,143.33 ✓	
2 Interest	211,293.02			211,293.02	
3 Partnerships etc.	(3,315.37)	223.33 ✓		(3,092.04) ✓	
4 Rents.	(26,835.94)	✓		(26,835.94) ✓	
5					
6					
7 Sales securities	8,135.99	8,437.50		16,573.49 ✓	
8 Dividends	1,051,424.45			1,051,424.45 ✓	
9					
10 Other Income	7,939.35		10,731.00	(2,791.65) ✓	
11	1,356,784.83	8,660.83	10731.00	1,254,714.66	
12 Interest	599,963.01			599,963.01	
13 Taxes	117,655.63			117,655.63	
14					
15 Contributions	75,283.10	154.53		75,128.57 ✓	
16					
17 Other Deductions	37,278.86	1,040.00		36,238.86 ✓	
18	830,180.60	1,194.53		828,986.07	
19	426,604.23		875.64	425,728.59	
Net income subject to ordinary taxes					
Add: Capital					
Net gain					
Total income					

Wife's net gain or loss ..... $.....

Husband's net income or loss ..... $.....

R.B. Mellon.

Schedule 1- A. Continued.

Line 3-- Reported loss 3,315.37

	Amended	Original
A. Overholt and Co.	(32,503.93)	(32,727.26)
West Overton	(10,027.58)	(10,027.58)
J. R.--A.W. and R. Mellon	39,439.47	39,439.47
Net Loss	3,092.04	3,315.37

See reports on the above.

Schedule 1- B. 1921

Line 4. Reported loss $ 26,835.94 corrected Same.

Income:

Joint Account	$ 36,766.29
W.L.Mellon # 2	102.87
Agents records--various properties	13,387.13
Fifth Ave. & Shady--net	(1,523.08)
Diamond St. net	4,526.08
	$53,259.29

Expenses:

Joint Account	77,938.13	
W.L.Mellon #2	2,157.10	
		80,095.23
Net Loss		$26,835.94

Line 5. Reported none--corrected none.

Line 6. " " " "

Line 7. Reported 8,135.99 Corrected 16,573.49

		Acquired	Cost.	S. P.	Profit or Loss
	Hukill Hunter		See Joint Acct.		(32,967.00)
	Penn Mining		" "		(983.51)
3700	Amer. Loco.	1920-21	293,017.50	342,309.50	49,292.00
200	" "	1920	17,930.00	19,162.00	1,232.00
				Net Profit	16,573.49

Defendant's Ex "PP" 10/29/34 U.T.

R.B.Mellon.

Schedule 1- E--1921

Line 16. Reported none--corrected none.

Line 17. Reported 37,278.86 corrected as follows:

	Original	Amended.
Joint Acct. expense	22,688.24	21,648.24
Office Expense	11,176.08	11,176.08
W.L.Mellon # 2.	1,507.02	1,507.02
Miscellaneous	1,907.52	1,907.52
Total.	37,278.86	36,238.86

Schedule # 2. Computation of Tax.

Net Taxable Income.	$ 425,728.59
Less--Dividends	1,051,424.45
	-0-
Surtax on 425,728.59	216,719.01
Less 2% Tax paid at source	1,826.87
Tax Liability	214,892.14
Less Paid per return	215,366.29
Overassessment	$ 474.15
2% Tax free Int.per report	-0-
Joint a/c	94,504.07
Direct	1,089.50
	95,593.57
Less 1/2 I.R.S. Joint a/c	4,250.00
Net	91,343.57
2% of above.	

E9

The omitted portions of said Defendant's Exhibit "PP", together with the parts set forth above, are also incorporated herein by reference and made part hereof, the original said exhibit in certified photostatic form having been duly certified to the Circuit Court of Appeals wth the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibits be sent up in their original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "QQ", being certified photostatic copy of a letter dated March 26, 1926, to the Commissioner of Internal Revenue from W. P. Mays, Supervising Internal Revenue Agent, transmitting internal revenue agent's report dated March 6, 1926, submitted to the internal revenue agent in charge, *in re* Richard B. Mellon for the years 1922 and 1923.

That the full purport and substance of said exhibit so offered and admitted in evidence is contained in the parts thereof which are in words and figures as follows:

Defendant's Exhibit "QQ".

(Pages 528 a-528m.)

LETTER TRANSMITTING REPORT OF FIELD EXAMINATION FROM INTERNAL REVENUE AGENT IN CHARGE TO THE COMMISSIONER

Pittsburgh DIVISION

Mar. 26, 1926.

Taxpayer Richard B. Mellon

Transcript address:

Street 6500 Fifth Avenue

City Pittsburgh State Pa. IT-R

Filing district 22nd Serial No. 1 24 P.

Present name and address, if different:

Name 614 Pittsburgh Life & Tr. (Business)

Street

City State

RECOMMENDED

Year	Additional tax	Overassessment
1922	1,342.68	-
1923	-	7,765.33
Net Result		$ 6,422.81

RECORDS DIVISION.
Received APR 8 1926
Recorded APR 8 1926
Closed

Commissioner of Internal Revenue,
Washington, D. C.

Attention of Head Personal Audit Division
(Thru Book-Records Division)

Inclosed herewith is a report of Internal Revenue Agent in C. C. Shannon,

dated Pittsburgh, Pa., covering his investigation of the above-named (corporation) (individual) (partnership) (estate) for the years 1922 to 1923, inclusive, indicating a net overassessment of $ 6,422.81.

A copy of this report beginning with the table of contents has been furnished the taxpayer. The subsequent action taken in the report after furnishing the taxpayer a copy thereof has been as follows:

Taxpayer consented to the findings of revenue agent within the 60-day period and signed statement consenting to agreement of 6 net overassessment.

Special comments are made as follows:

Claim of case Individual

Attached hereto are Introductory, 2 pages; exhibits, 37 pages; containing 11 schedules.
Agreement 30%; C.L. for 1922 & 1923.

Respectfully, Internal Revenue Agent in Charge

(See reverse side of this sheet for instructions)

Form 882

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

PITTSBURGH, PA.

March 6, 1926.

In Re: Richard B. Mellon,
6500 Fifth Ave.,
Pittsburgh, Pa.

Examining Officer	Examination Commenced	Examination Completed	Time
M. C. Shannon	January 19, 1926	March 6, 1926	18 days

Internal Revenue Agent in Charge,
Pittsburgh, Pa.

NOT PROTESTED

All computations and calculations verified by accountant of the Bureau of Internal Revenue Agent in Charge.

An examination of the books and records of the above-named individual for the years 1922 and 1923 disclosed the following in connection with his income tax liability:

SUMMARY

Year	Additional Tax	Overassessment	Form No.	Coll. Dist.
1922	1,342.52	0		
1923	0	7,765.33		
Totals	1,342.52	7,765.33		
Less		1,342.52		
Net Overassessment		6,422.81		

Exemption Status: Married living with wife (Jennie K. Mellon) at 6500 Fifth Ave. Pittsburgh, Pa.

Wife (Jennie K. Mellon) files separate return and uses the full exemption in both years.

Business: Banker

Authority for Examination: Original returns for the years 1922 and 1923.

Basis for Comparison: Original returns for the years 1922 and 1923 and they are herewith returned. Attention is called to the discrepancy between the income as shown on the return, and this report, and that shown on Forms 1099 and 7839. This is due to the fact that the taxpayer keeps his books on the Cash Receipt and Disbursement basis, and the income shown in this report is the income received and entered upon the books during the current year. The largest and principal items being supported by schedules which are made a part of this report.

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Defendant's Ex. 39 10-23-34 H.T.

In Re: Richard B. Mellon

Income is derived from Salaries, Interest on Bonds, Notes and Mortgages, Income from Fiduciary and Partnerships, Profits from Sales, Income from Rental Properties and Dividends on Stock. The changes effecting the income for 1922 are as follows:

Decrease in Tax - free Bond Interest, said amount being added to the item of other Bond Interest. Increased Income from A. Overholt & Co. (Partnership) and increase in income from J. R. - A. W. & R. B. Mellon, Trustees.

Changes for the year 1923 are as follows:

Decrease in Tax, free bond interest, same being added to item of other bond interest. Increased Loss from Partnership (A. Overholt & Co.) Decrease in Taxes Paid. Contributions increase, and Increase in Capital Net Gain from Sale of Capital Assets, and error of not considering the Capital Net Gain in computing the 15% limitation for Contributions.

The changes in this report have been discussed with D. J. Hicks, Agent for Richard B. Mellon who approves the same, and who has signed Form 874.

M. C. Shannon,
Internal Revenue Agent.

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In Re: Richard B. Mellon

Schedule No. 1
Year 1922

Block Adjustments

	Return	Additions	Reductions	Corrected
1. Salaries	8,115.00			8,115.00 ✓
2. Income from Business	None			None
3. Interest on Tax free Cov.Bond	99,005.89		4,650.00	94,355.89 ✓
a " " other Bonds, Mtges. etc.	80,134.50	4,650.00		84,784.50 ✓
4. Income from Partnerships,etc.				
a Union Trust Co. liquidating Act. for A. Overholt & Co.	16,548.11	2,935.07		19,483.18 ✓
b Union Trust Co. liquidating Act. for West Overton Distilling Co	(10,655.46)			(10,655.46) ✓
c J.R.-A.W.&R.B. Mellon, Trustees	40,433.61	5.00		40,438.61 ✓
5 Rents & Royalties	(34,459.06)			(34,459.06) ✓
6 Profit from Sales	179,634.00			179,634.00 ✓
7 Dividends on Stock	1,292,555.77			1,292,555.77 ✓
8 Tax. Lib. Bond Interest	0			0
9 Other Income				
a Foreign Stocks	6,318.50			6,318.50 ✓
b Insurance Refund	44.10			44.10
c Miscellaneous	201.00			201.00
10 Total Income	1,677,975.96			1,680,816.03
11 Losses by Fire, Storm, etc.	None			None
12 Interest Paid	807,472.13			807,472.13 ✓
13 Taxes Paid	125,185.80			125,185.80 ✓
14 Bad Debts	367,186.72 ✓			367,186.72 ✓
15 Contributions (15%	59,218.43		441.01	59,659.44 ✓
16 Other Deductions				
a Grace Contracting Co. Charter surrendered (300 shrs.@ 100.00)	30,000.00			30,000.00 ✓
b Office Expense - Salaries Rents-Traveling Expense	53,107.95			53,107.95 ✓
17 Total Deductions	1,442,171.03			1,442,612.04
18 Net Inc. subject to Ordinary Taxes	235,704.93	7,590.07	5,091.01	238,203.99 ✓
Add Capital Net Gain	99,866.19			99,866.19 ✓
Total Income	335,571.12	2,499.06		338,070.18
Wife's Income reported on separate return				

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[redacted]

Corrected $8116.00

Corrected $94355.89

In many cases [illegible] available records they are not tax free:

Interboro Rapid Transit [illegible] Acct. $3500.00 = 1/2 of)	$4,250.00
Country Club of Allegheny County	200.00
University Club, Pittsburgh, Pa.	200.00
Total as Difference	$4,650.00

Item 3a- Other Bond Interest

Reported on return $80134.50 Corrected $84784.50

This is accounted for by the transfer of $4650.00 from tax-free bond interest to other bond interest as above shown.

Schedule 1-A

Item 4 - Income from Partnerships & Fiduciaries

a	Reported on return - A. Overholt & Co.	$16548.11	Corrected	$19,483.18
b	" " " West Overton Distilling Co.	(10655.46)	"	(10,655.46)
c	" " " J.R.-A.W.&R.B. Mellon Trustees	40433.61	"	40,438.61

Explanation of Changes

a Income from A. Overholt & Co. is increased $2935.07 in accordance with Revenue Agent's report on said company under date of February 26, 1925.

b. Loss from West Overton Distilling Co. $10655.46
No change is made as per report of Revenue Agent under date of Feb. 26, 1925.

c. Income from J. R. - A. W. & R. B. Mellon, Trustees. This item is increased $5.00 due to clerical error in listing.

Defendant's Ex "QQ" 10/29/34 H.T.

In Re: Richard B. Mellon

Schedule 1-5

Year 1922 Form 1040

Explanation of Items

Item 5 - Rents & Royalties

There are no changes in this item and a complete schedule of rental properties follows later in this report: The rates of depreciation, as used in the schedule, are the same rates used in previous reports and were accepted by the Department. Other Expenses in the schedule are made up from the accounts of Interest - Taxes and Commissions.

It will be noted that in the Schedule of Rents, items 1 to 43 inclusive are from the joint account of Andrew W. and Richard B. Mellon (1/2 each.)

Item 44 - Sundry - W. L. M. #2 - is from properties owned by W. L. - A. W. & R. B. Mellon, and the remaining items are properties owned by R. B. Mellon..

Schedule 1-6

Item 6 - Profit from Sales - No Change

Kind	Acquired	Cost	Sale Price	P. or L.
Am. Locomotive Stock	1922	81,042.50	90,392.00	9,349.50
" " "	1920	521,940.00	681,778.50	159,838.50
" " "	1922	68,040.00	70,536.00	2,496.00
" " "	1922	9,610.00	11,756.00	2,146.00
" " "	1922	97,920.00	102,158.00	4,238.00
Interboro Rapid Transit	1921	9,837.00	11,403.00	1,566.00
Totals		788,389.50	968,023.50	179,634.00

Schedule 1 - 7

Item 7 - Dividends on Stock

Reported on return $1,292,555.77 Corrected $1,292,555.77

See Schedule of Dividends

Schedule 1- 8

Item 8 - Taxable Liberty Bond Interest

Reported on return None Corrected None

Schedule 1 - 9

Item 9 - Other Income	Return	Corrected
a Dividends (Foreign Corporations)	6,318.50	6,318.50
b Insurance Refund	44.10	44.10
c Miscellaneous	201.00	201.00
Totals	6,563.60	6,563.60

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In Re: Richard B. Mellon

Schedule 1-11

Item 11 - Losses by Fire, Storm, etc.
Reported on return, None — Corrected None

Schedule 1-12

Item 12 - Interest Paid
Reported on return $807472.13 — Corrected $807472.13

Schedule 1-13

Item 13 - Taxes Paid

Reported on return $125185.80		Corrected $125185.80
City, County and State Taxes	124,740.00	
Luxury Taxes	445.80	
Total	125,185.80	

Schedule 1-14

Item 14 - Bad Debts

Reported on return $367,186.72		Corrected $367,186.72
Grace Contracting Company	364,497.98	
F.T.F. Lovejoy note - Uncollectible	425.00	
N. R. Horn " "	854.28	
P. S. Bartoe " "	500.00	
K. M. Lovejoy " "	500.00	
J. M. Kelly " "	409.46	
Total	367,186.72	

The Robert Grace Contracting Company of Pittsburgh, Pa. was incorporated October 15, 1909 under the laws of Pennsylvania, with a Capital Stock of $100,000.00 all issued for cash.

A. W. & R. B. Mellon owned jointly (600 shares @ $100.00 on $60,000.00) and they had loaned said company the sum of $1,311,900.00 as will be hereinafter shown by Balance Sheet of said company. On October 13, 1922, the Grace Contracting Company liquidated, selling all the assets to the Mellon-Stuart Co. of this city for $600,000.00 in cash, said cash being used to pay off preferred creditors - the said amount not being sufficient to pay off all indebtedness as shown by balance sheet as at December 31, 1922.

Summary of Loss

Capital Stock - A. W. & R. B. Mellon (1/2 each)			
A. W. Mellon	30,000.00		
R. B. Mellon	30,000.00	Total	$60,000.00
Joint Loans - A. W. & R. B. Mellon			728,995.96
A. W. Mellon	364,497.98		
R. B. Mellon	364,497.98		

Defendant's Ex "QQ" 10/29/34 H.T.

In Re: Richard B. Mellon

Balance Sheet as at December 31, 1921
Robert Grace Contracting Company,
Pittsburgh, Pa.

Assets	
Cash	1,281.84
Accounts Receivable	76,586.22
H. Kleinhans Co.	4,650.62
Bills Receivable	341,157.37
H. Kleinhans Co.	130,000.00
Interest in advance	12,842.26
Stock of Domestic Corpn.	200,000.00
" " Sub. Co's.	5,000.00
H. Kleinhans Co.	95,000.00
Total Assets	866,518.31
Liabilities	
Accounts Payable	22,081.01
Contr. - Equip. - & Sup. Co.	5,000.00
H. Kleinhans Co.	43.26
Bills Payable	1,311,900.00
Accrued Interest	613.34
Capital Stock	100,000.00
Surplus	(623,119.30)
Total Liabilities	866,518.31

Balance Sheet as at December 31, 1922

Assets	
Cash	2,589.23
Prepaid Interest	2,710.77
Total Assets	5,300.00
Liabilities	
Notes Payable	709,900.00
Accounts Receivable	20,900.00
Capital Stock	100,000.00
Surplus	(825,500.00)
Total Liabilities	5,300.00

Total Joint Loans to Robert Grace Contracting Co. by
A. W. & R. B. Mellon - 1/2 each 1,311,900.00
Less Payments 582,904.04
Balance due 728,995.96

Andrew W. Mellon	364,497.98
Richard B. Mellon	364,497.98

The other notes listed in schedule are uncollectible - no assets.

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In Re: Richard B. Mellon

Schedule 1-15

Item 15 - Contributions

Reported on return $59,218.43, Corrected $59,659.44

The income having been increased in the amount of $2940.07, the taxpayer is allowed 15% of this item as an additional deduction under the head of Contributions as the Schedule of Contributions shown $70,825.60.

Schedule 1-16

Item 16 - Other Deductions

a. Grace Contracting Company - Capital Stock - total loss as shown previously in this report. $30,000.00

b. Office Expense - Salaries - Rents - Traveling Expenses $53,107.95

Schedule 1-17

Item - Capital Net Gain taxable @ 12½%

Kind	Acquired	Cost	Sale Price	Profit
Koppers Company	1914 - 1915	343,831.41	443,697.60	99,866.19

This stock was sold to the McClintock Marshall Construction Company in 1918, under an optional agreement - Optional and partial payment made in the year 1922 as above shown.

Capital Net Gain - $99,866.19 @ 12½% = $12,483.27.

Schedule No. 2

Year 1922 Form 1040

Computation of Tax

Total Net Income subject to ordinary taxes $238,203.99

(Less Exemptions taken by wife, Jennie K. Mellon) None

Income subject to normal tax $ 90,062.00

Normal tax @ 4% 1,802.48

Income subject to surtaxes (Capital Net Gain) @ 12½% 12,483.27

Surtax 102,545.27

Less Ex. allowed 1,987.12

Total Tax 100,558.15

Tax Paid 88,211.44

Additional 12,346.71

Defendant's Ex "QQ" 10/29/24 H.T.

Schedule 3

D O N A T I O N S

R.B.MELLON - CALENDAR YEAR 1922

Jan. 3	-	Pittsburgh Goodwill Industries, Pittsburgh, Pa.	$1,000.00
Feb. 6	-	Western Penna. Humane Society Pittsburgh, Pa.	50.00
	-	Boy Scouts of America, Western Penna. Div. Pittsburgh, Pa.	100.00
	-	East Liberty Presbyterian Church Penn & Highland Aves., Pittsburgh, Pa.	50.00
Mar. 2	-	Shiloh Baptist Church, Butler, Pa.	50.00
Mar. 3	-	Pittsburgh Community Service, Pittsburgh, Pa.	50.00
Mar. 10	-	Tuberculosis League of Pgh., Pittsburgh, Pa.	284.50
Apr. 17	-	Fruit & Flower Mission, Pittsburgh, Pa.	10.00
	-	Associated Charities, Pittsburgh, Pa.	250.00
	-	Playground & Recreation Association, New York, N. Y.	100.00
Apr. 28	-	Pittsburgh Orchestra Association, Pittsburgh, Pa.	30.00
May 3	-	Girl Scouts, Pittsburgh, Pa.	100.00
May 4	-	Western Theological Seminary, U. P., Pittsburgh, Pa.	500.00
May 10	-	Boy Scouts of America, Pittsburgh, Pa.	250.00
May 18	-	Children's Hospital of Pgh., Forbes St. & McDevitt Place, Pittsburgh, Pa.	100.00
June 6	-	National Tuberculosis Association, New York, N. Y.	5.00

1	Salaries					
2	Interest from Dominion Bonds					
3	Int. on Provincial Government Bonds			4,510.00		
4	" " Other Bonds, Stocks, etc.					
5	Income from Partnerships					
6	Union Trust Co. Liquidating Account					
7	Union Trust Co. Liquidating Account for Work Creation Activities					
8	J.E.A. Kahl & Fellow Trustees					
9	Rents & Royalties					
10	Profit from Sales					
11	Dividends on Stock					
12	Possible Liberty Bond Interest					
13	Other Income					
a	Foreign Dividends					
b	Idlewood Rental Settlement					
c	Underwriting Syndicate Profit 1,740.41					
14	Total Income					
15	Interest Paid					
16	Taxes Paid					
17	Losses by Fire, Storm etc.					
18	Bad Debts					
19	Contributions (15%)					
20	Other Deductions					
a	Salaries - Office Expense Rents, etc. 34,574.45					
b	Kleeco Lease, fees, etc. 2,418.24					
c	Brushton Plan of Lots 2,849.81					
d	13th Ward Property - Taxes & expenses closing out 11,207.18					
21	Total Deductions					
22	Net Inc. subject to Ordinary Taxes	720,619.09	6,147.81	36,947.41	688,819.49	
23	Add: Capital Net Gain	151,127.25	46,380.00		198,507.25	
24	Total Income	871,746.34	52,527.81	36,947.41	887,326.74	

Corrected $3270.00

Schedule 7-3

Item 2 - Income from Partnerships
Reported on return None Corrected None

Schedule 7-3

Item 3 - Interest on Tax - free Covenant Bonds
Reported on return $70710.50 Corrected $70900.50
The following items were included as tax-free bond interest and in accordance with available records they are not tax-free:

Interboro Rapid Transit	4,250.00
Country Club (Allegheny County)	200.00
University Club, Pittsburgh, Pa.	300.00
Hill School	60.00
Difference	$4,810.00

Item 3a -Other Interest
Reported on return $152643.72 Corrected $157453.72
This change is accounted for by the transfer of $4810.00 from tax-free bond interest to other bond interest as above shown.

Schedule 7-4

Item 4 - Income from Partnerships & Fiduciaries

a	Reported on return A. Overholt & Co.	$(11682.09)	Corrected	($14,400.50)
b	" " " West Overton Distil. Co.	(9938.13)	"	(9938.13)
c	" " " J.R.-A.W.&R.B. Mellon Trustees	38941.04	"	38941.04

a Loss from A. Overholt & Co. is increased $2718.41 in accordance with report of Revenue Agent on said Partnership under date of February 18, 1926. Checked with R&R

b Loss from West Overton Distilling Co. No change is made as per Revenue Agent's Report under date of February 18, 1926.

c Income from J. R. - A. W. & R. B. Mellon, Trustees.

No. Change.

Defendant's Ex "QQ" 10/29/34 F.T.

In Re:- Richard B. Mellon

Schedule 7-5

Year 1923 Form 1040

Item 5 - Rents & Royalties

Reported on return $49379.44 Corrected $49379.44

See Schedule of Rents.

The rates of depreciation as used in schedule are the same rates as were used in previous reports and were accepted. The items of Other Expense in schedule consist of Interest - Taxes and Commissions. It will be noted in Schedule of Rents that items 1 to 44 inclusive, are in connection with properties owned jointly by Andrew W. & Richard B. Mellon.

Item 45 - Sundry - W. L. Mellon No. 2
Properties owned jointly by W. L. - A. W. & R. B. Mellon
(1/3 each)

Schedule 7-6

Item 6 - Profit from Sales

Kind	Acquired -	Cost	Sale Price	Profit or Loss
Baldwin Locomotive	1922	59,300.00	70,280.00	10,980.00
" "	1922	54,730.00	56,729.00	1,999.00
" "	1923	244,580.00	249,035.00	4,455.00
American "	1922	122,457.50	136,660.00	14,202.50
" "	1923	136,790.00	153,998.00	17,208.00
P. R. R. (6% Bonds)	1922	4,950.00	5,381.25	431.25
American Locomotive	1923	51,480.00	50,329.00	(1,151.00)
Pittsburgh Coal Co.	1922	11,830.00	13,362.00	1,532.00
Totals		686,117.50	735,774.25	49,656.75

Sale of Assets held for more than two years.

Joint Account	Acquired -	Cost	Mar.1,1913 Value	Sale Price	Profit or Loss
Real Estate	1920	25,563.90	0	27,700.00	2,136.10 ✓
Bonds Union Steel	1903	1266,000.00	1326,135.00	1367,280.00	41,145.00 ✓
American Fruit Growers	1919	100,000.00	0	48,790.00	(51,210.00) ✓
Koppers Company Stock	1915	887,395.20	0	1103,193.60	215,798.40 ✓
Total - A. W. & R. B. Mellon 1/2 each					207,869.50 ✓
R. B. Mellon - 1/2 =					103,934.75 ✓
Acheson Stock	1903	56,250.00	108,555.00	200,000.00	91,445.00 ✓
Carborundum Stock (1000 shares)	1902	70,533.33	272,380.00	225,000.00	0
E. P. S. & P. Stock	1921	7,762.50	0	10,800.00	3,037.50 ✓
H. H. Gun Club	1903	100.00	100.00	190.00	90.00 ✓
Total Capital Net Gain taxable @ 12½%					198,507.25 ✓
" " " " reported on return					151,127.25
Increase in Capital Net Gain					47,380.00

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In Re: Richard B. Mellon

Schedule 7-A

The above increase of $47350.00 in [illegible] is amount
the disallowance of this amount (when [illegible] loss in the sale of
shares of Carborundum stock by the taxpayer on the original
Reg. 62 - Art. 1561. The gain or loss is recognized in
property acquired before March 1, 1913, and sold or
more than cost but no less than its fair market value

Schedule 7-B

Item 7 - Dividends on Stock
Reported on return $[illegible]
(from Schedule of

Schedule 7-C

Item 8 - Taxable Liberty Bond Interest
Reported on return $[illegible]

Schedule 7-D

Item 9 - Other Income
a Foreign Dividends
b Interest Annuity Settlement
c Underwriters Syndicate Profit

Schedule 7-11

Item 11 - Interest Paid
Reported on return $[illegible]
Interest paid on notes and margin accounts

Schedule 7-12

Item 12 - Taxes Paid
Reported on return $[illegible]
[illegible]
Items of $17.00 and 140.31 entered twice
taxes Paid - $17. County, State and [illegible]

Schedule 7-13

Item 13 - Losses by Fire, Storm, etc.
Reported on return [illegible]

Exhibit No. 1

[redacted] 1926

Computation of Tax.

[redacted]		$[redacted]
[redacted]		
	$5,360,892.01	5,360,892.01
[redacted]		
		216,369.78
		24,813.41
Total Tax		340,183.18
Less Tax withheld at source $1,418.01		
Less (20% reduction in tax) 85,045.79		86,463.80
Total Tax assessable		253,719.36
Tax previously assessed		261,484.69
	Overassessment	7,765.33

Revised sheet

Defendant's Ex "QQ" 10/29/34 H.T.

In Re: Richard B. Mellon

Schedule No. 9

List of Dividends - 1923

Ligonier Valley R. R.	300.00
P. & L. E. R. R.	2,530.00
Bessemer Trust Co.	3,510.00
Braddock National Bank	12,012.00
Bank of Charleroi	8,000.00
Duquesne Trust Co.	900.00
East Pgh. Svgs. & Trust Co.	1,530.00
Farmers & Merchants W. B. West Newton	175.00
" Nat'l Bank - Freeport	60.00
Fidelity, Title & Trust Co.	40,000.00
First National Bank, Donora	120.00
" " " Ford City	1,187.50
" " " Port Arthur	480.00
" " " Scottdale	2,750.00
Fourth St. National Bank	1,600.00
Logan Trust Co. New Kensington	3,960.00
Mellon National Bank	114.00
Monongahela Trust Co.	1,200.00
National Bank of Com. N. Y.	18,000.00
Peoples Nat'l Bank, Ellwood City	2,200.00
Scottdale Svgs. & Trust	600.00
Second Nat'l Bank, Uniontown	400.00
Title & Trust Company, West Virginia	1,935.00
Union Svgs. Bank	60.00
Union Trust Co. East St. Louis	600.00
" " " Pgh, Pa.	627,800.00
" " " Donora	720.00
Wilkinsburg Bank	1,452.00
Workingman's Svgs. & Trust Co.	1,500.00
American Surety Co.	225.00
Aluminum Company of America	377,848.50
Carborundum Co.	68,631.00
Consolidated Ice Co.	11.25
Gulf Oil Co.	7.52
Achesan Graphite	1,875.00
McClintock-Marshall Cons. (Com.)	63,210.00
" " " (Pfd.)	16,429.00
Standard Steel Car Co.	24,600.00
Union Fidelity Title Ins. Co.	60.00
" Springs Mfg. Co.	9,600.00
West Braddock Bridge Co.	122.00
Mon. Light & Power	250.00
" Street Ry.	175.50
Kensington Water Co.	3,000.00
Westinghouse Air Brades	365.40
Pgh. Coal Co.	800.00

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The omitted portions of said Defendant's Exhibit "QQ", together with the parts set forth above, are also incorporated herein by reference and made part thereof, the original said exhibits in certified photostatic form having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof pursuant to stipulation between counsel and order of this court that said exhibits be sent up in their original certified photostatic form with, and as part of, the transcript of record, as appears elsewhere herein.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "RR", being a certified photostatic copy of a letter dated March 5, 1926, to Mr. Richard B. Mellon from the Commissioner, relating to his income tax for 1921.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "RR".

March 5, 1926.

Mr. Richard B. Mellon,
514 Smithfield Street,
Pittsburgh, Pa.

Sir:

An audit of your income tax return for 1921, in connection with the Revenue Agent's report dated November 17, 1925, discloses an overassessment of tax in the amount of $1,833.65, details of which are as follows:

The report of the examining officer has been accepted with the following exceptions:

In accordance with the evidence presented in your protest, the loss on the sale of the stock of the Penn Mining Company has been increased from $983.51, as shown by the agent, to $3,522.26.

The deduction for contributions has been decreased from $75,128.57, as shown by the agent, to $74,747.76, representing 15% of your corrected net income without the benefit of this deduction.

A recomputation of your tax follows:

Net income subject to surtax, as shown by the agent (no income subject to normal tax)		$425,728.59
Less: Increase in stock loss	$2538.75	
Decrease in contributions	380.81	2,157.94
Corrected net income subject to surtax		$423,570.65
Surtax on $423,570.65		$215,359.51
Less 2% tax paid at source		1,826.87
Balance		$213,532.64
Tax previously assessed		215,366.29
Overassessment		$ 1,833.65

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the Collector of Internal Revenue for your district. If the tax in ques-

tion has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an unpaid assessment which has been entered but not paid.

Respectfully,

Assistant to the Commissioner.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "SS", being a certified photostatic copy of a letter dated February 16, 1928, to Mr. Richard B. Mellon from the Deputy Commissioner, relating to the income tax for the year 1923.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "SS".

February 16, 1928.

Mr. Richard B. Mellon,
514 Smithfield Street,
Pittsburgh, Pennsylvania.

Sir:

A review of the report submitted by the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania,

covering your tax liability for the year 1923, discloses a deficiency of $3,357.56.

If you acquiesce in the proposed adjustments, as shown in this letter and the accompanying statement, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:PL. In the event that you acquiesce in a part of such proposed adjustments, the form should be executed with respect to the items to which you agree.

If, however, you do not acquiesce in all of the proposed changes, you are granted a period of 10 days from the date of this letter to file a protest and request a hearing at Washington if desired.

The protest must cover all items which the taxpayer questions and may be accompanied by a statement of additional facts or by a brief or both. It must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer; (b) the designation by date and symbol of the letter advising of the tentative deficiency with respect to which the protest is made; (c) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (d) an itemized schedule of the findings to which the taxpayer takes exception; (e) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (f) in case the taxpayer desires a hearing, statement to that effect.

If no reply is received within the period mentioned above, it will be assumed that no hearing is desired and the Bureau will proceed to close the case in the usual manner.

If, after said hearing and consideration by this office of evidence or briefs of argument submitted, the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail, in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,

Enclosures:
Statement
Form A.

Deputy Commissioner.

Feb. 16, 1928.

In re: *Mr. Richard B. Mellon,*
514 Smithfield St.,
Pittsburgh, Pennsylvania.

	Deficiency
1923	$3,357.56

Reference is made to the report of the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania,

transmitted to this office under date of March 26, 1926, which has been reviewed and approved with the following exceptions:

The deduction of $52,052.50 claimed under the item "Rents and Royalties" A. W. and R. B. Mellon properties for taxes paid on the J. M. Guffey Company coal lands, has been disallowed. As these taxes were paid for account of the corporation's properties, the amount is considered an advance to the corporation and does not constitute an allowable deduction.

Engineers' fees and commissions in connection with the survey of the Guffey Company coal properties are held to be in the nature of capital expenditures and therefore not deductible from current income. The amount of $24,923.07 as claimed for account of the A. W. and R. B. Mellon properties for such expenses has been disallowed.

In accordance with the analysis of the Gulf Oil Corporation Stock, "Account No. 3", H. A. Phillips, Agent, furnished by your representative, there has been included in your income for 1923 your proportionate share of the dividends received in the amount of $16,068.75; and the loss of $30,182.50 as the result of sales under this account has been allowed as a deduction.

Net income reported on return		$ 720,619.09
Add:		
1. Deduction for J. M. Guffey Coal Company taxes disallowed (½ of $52,052.00)	$ 26,026.25	

2. Engineering fees disallowed (½ of $24,923.07).	12,461.53	
3. Dividends received (⅓ of $16,068,753)	5,356.25	
4. Miscellaneous taxes ..	337.81	44,181.84
		$764,800.93
Deduct:		
5. Additional distributive loss A. Overholt and Company	2,718.41	
6. Increase in losses on stock sales (⅓ of $30,-182.50)	10,060.83	
7. Contributions increased.	34,486.48	47,265.72
Ordinary income as adjusted		$ 717,53.521
Capital net gain reported .		$ 151,127.25
Capital loss disallowed ...		47,380.00
Capital net gain as adjusted		$ 198,507.25
Ordinary income adjusted .		717,535.21
Net income adjusted		$ 916,042.46

COMPUTATION OF TAX

Net income adjusted	$ 717,535.21
Dividends	3,366,249.26
Income subject to normal tax	None

Surtax on $717,535.21		$ 329,727.60
12½% on $198,507.25		24,813.41
		$354,541.01
Less: Tax paid at source		1,418.01
		$353,123.00
Less: 25% reduction, Section 1200, Revenue Act 1924 ...		88,280.75
		$264,842.25
Tax previously assessed ...	$348,646.25	
Less: 25% reduction	87,161.56	261,484.69
Deficiency		$ 3,357.56

EXPLANATION OF CHANGES

1 and 2. Your one-half share of the taxes and engineering fees in connection with the Guffey Coal Company lands has been disallowed for the reasons stated above.

3. Dividends have been increased by your one-third share in the Gulf Oil Corporation account designated No. 3.

4. The deduction for taxes has been reduced by items entered twice.

5. Distributive loss sustained through the partnership of A. Overholt and Company has been increased in accordance with the recommendation of the examining officer.

6. Losses on sales of stock have been increased by your one-third share in the results of sales in the Gulf Oil Corporation Account No. 3.

7. The amount of $127,168.07 deducted for contributions has been increased to the 15% limitation by considering capital net gain and increased ordinary income.

The 25% credit allowable under Section 1200 of the Revenue Act of 1924 has been computed in accordance with the decision in the appeal of the Estate of Philip M. Reynolds, United States Board of Tax Appeals, Volume 8, Page 360.

If the above adjustments are satisfactory, it is suggested that you execute and return to this office the enclosed agreement waiving the right to appeal and consenting to immediate assessment in order that your case may be closed without delay.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Mr. Eustace:

Defendant offers in evidence Defendant's Exhibit "TT", being copy of a letter dated March 5, 1926, from the Commissioner of Internal Revenue to Hon. A. W. Mellon; and this being from the files of the Bureau of Internal Revenue, we ask leave to withdraw the exhibit and substitute later a photostatic copy.

Mr. Booth:

I object to the introduction of Defendant's Exhibit "TT". It is an unsigned carbon copy of a letter to Mr. Mellon, with a schedule on it.

The Court:

Has there been any demand upon the plaintiff to produce the original?

Mr. Booth:

No, sir.

Mr. Eustace:

We now make demand upon the plaintiff to produce in evidence original letter from the Commissioner of Internal Revenue to A. W. Mellon dated March 5, 1926, original letter dated March 16, 1928, original letter dated February 16, 1928; original letter from the Commissioner of Internal Revenue to R. B. Mellon dated March 5, 1926, letter dated February 16, 1928, letter dated February 24, 1927.

Mr. Booth:

I submit it is too late now to make demand upon us, in the middle of the trial.

The Court:

It is an untimely demand, of course. As I look at these various offers, I confess I am quite at a loss to see their relevancy in this case. I am admitting them with reserved rulings, however, until I can examine them in connection with the whole thing. As to that exhibit, before it could be introduced, you really ought to have a demand for the production of the original

or at least somebody who will testify that it was from the files and is a copy of the letter which was actually sent.

Testimony of E. L. Updike.

Whereupon, E. L. Updike was called as a witness on behalf of defendant and, having been first duly sworn, was examined and testified in substance as follows:

My name is E. L. Updike. I reside in Washington, D. C., and I have held various positions with the Bureau of Internal Revenue, starting September 16, 1920, as assistant auditor up to and including assistant chief accountant and auditor; then the position of senior attorney. I now hold the position of Senior Attorney in the Office of the Assistant Chief Counsel for the Bureau of Internal Revenue.

Q. You may state whether or not you have had the custody of the files of the Bureau of Internal Revenue relating to the income tax returns of A. W. Mellon and R. B. Mellon, named as plaintiffs in the pending suits, for the years 1920, 1921, 1922, 1923, 1924 and 1925?

A. The same were submitted to me by the Administrative Section and by the Civil Division of the General Counsel's Office for use in connection with these two proceedings, also for use in connection with another proceeding involving A. W. Mellon pending before the United States Board of Tax Appeals.

Q. Handing you what has been marked for identification as Defendant's Exhibit "TT", I ask you to

state whether or not that instrument was contained in any of the files which you have described?

A. Yes, sir, when the same were furnished to me.

Mr. Eustace:

Defendant now offers in evidence Defendant's Exhibit "TT".

Mr. Booth:

We ask leave to examine the witness.

The Court:

Go ahead.

Mr. Booth:

Q. Mr. Updike, you are not in the Custodian Department, you don't have charge of the files?

A. Only the files of the cases assigned to the attorney, and on which the attorney whom I work with and I are working at the time; we keep the files there in our office, all papers relating to a particular case.

Q. After the file has been assigned to you?

A. After the case has been assigned, or we have been assigned to work on a case.

Q. The file comes from the Custodian Department?

A. We send through what we call a requisition for all of the papers relating to that particular taxpayer.

Q. You didn't have custody of these files from 1926 down to date?

A. No, sir.

Q. You didn't write that letter (Exhibit "TT")?

A. No, sir.

Q. You don't know who wrote it?

A. Let me take a look at it again; I may be able to tell from the initials on it. (Letter handed to witness.) The second initial appears—although I can't say for sure—to be the initial of Mr. Laird, of Section "B" of the Income Tax Unit.

Q. Do you know whether that letter was ever mailed out?

A. No, not of my own knowledge.

Q. Do you know whether the facts set forth in that letter are true and correct?

A. Not of my own knowledge.

Mr. Booth:

I think the letter is not admissible, sir, and I renew the objection.

The Court:

That objection, I think, will have to be sustained.

Mr. Eustace:

At this time the defendant moves for a continuance of the trial of this case until such time as the defendant may procure certified photostatic copies of necessary evidence to be used in the trial of this case. I will state to the Court in this connection that we have been working night and day since this case has been placed in the hands of the Department of Justice for the purpose of trial, and that we have procured and produced here certified photostatic copies of all exhibits which it has been physically possible to obtain

in the time at our disposal; and that we have additional exhibits here which are from the files of the Bureau of Internal Revenue, and which are necessary to the defense of these suits, and which we have not had the opportunity by reason of the lack of time to have photostated and certified as being from the records and files of the Bureau of Internal Revenue, and which we believe to be material to a determination of the issues in these cases.

The Court:

I am afraid that motion is a little indefinite. It should be supported, I think, by affidavit in the first place; and you have had notice, very considerable notice of the time, because the case was put off once.

Mr. Eustace:

Well, that notice might have been sufficient in some cases, but these cases involve a large amount of money, they involve production of a great mass of testimony—

The Court:

Yes, but the Court ought to be just as careful in all cases, whether the amount is large or not; the size of that which is involved ought not to make any difference in so far as the duties of counsel are concerned.

Mr. Eustace:

It makes a difference in the time necessary for preparation.

The Court:

If you had not had sufficient time, I would say all right; but there has been a great length of time. This case has been pending for several years.—Well, let us save trouble. As I say, I doubt the relevancy of it, but I will admit the exhibit for the present, reserving ruling as to the materiality and relevancy.

Mr. Eustace:

Then under that ruling may it be considered that Defendant's Exhibit "UU", being a letter dated February 10, 1928, from the Commissioner of Internal Revenue to Mr. A. W. Mellon, also from the files of the Bureau of Internal Revenue; and Defendant's Exhibit "VV", being a letter from the Commissioner of Internal Revenue, dated February 16, 1928, to A. W. Mellon, and additional exhibits yet to be marked, may be admitted under the same ruling, it being understood that Mr. Updike would testify with reference to each of these exhibits being now offered as he has testified with reference to Exhibit "TT".

The Court:

We will admit that under reserved ruling, and note an exception.

Which said Defendant's Exhibits "TT", "UU", and "VV", so offered and admitted in evidence are in words and figures as follows:

Defendant's Exhibit "TT".

March 5, 1926.

Hon. A. W. Mellon,
Woodland Road,
Pittsburgh, Pa.

Sir:

An audit of your income tax return for 1921, in connection with the Revenue Agent's Report dated November 17, 1925, discloses a deficiency in tax of $132,836.21, details of which are shown in the attached statement.

Inasmuch as you have agreed to the amount of the deficiency, the tax will be assessed on the next list.

Payment should not be made, however, until a notice is received from the Collector of Internal Revenue for your district.

Respectfully,

Commissioner.

STATEMENT

1921 additional tax .....$132,836.21.

The report of the examining officer has been approved with the following exception:

In accordance with the evidence presented in your protest the loss on the sale of the stock of the Penn

Mining Company has been increased from $938.51, as shown by the agent, to $3,522.26.

A recomputation of your tax follows:

Net income subject to surtax, as shown by agent's report	$2,404,642.85
Less: Increase in stock loss	2,538.75
Corrected net income subject to surtax (no income subject to normal tax)	$2,402,104.10
Surtax on $2,402,104.10	$1,494,812.67
Less 2% tax paid at source	1,928.75
Balance	$1,492,883.92
Tax previously assessed	1,360,047.71
Further tax due	$ 132,836.21

Defendant's Exhibit "UU".

Feb. 16, 1928.

Mr. A. W. Mellon,
Woodland Road,
Pittsburgh, Pennsylvania.

Sir:

Reference is made to the report of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, covering the years 1922 and 1923, dated March 3, 1926, wherein an overassessment of $913.39 was recommended for the year 1922.

In review of the report for the year 1923 and consideration of the account of J. M. Guffey on your books, the results of which you are being advised in a separate communication, it has been ascertained that a deduction was claimed in that year for taxes paid on the J. M. Guffey Coal Company properties. The deduction is being disallowed for the reasons that such payments were made for account of the pertinent corporation and are considered to be an advance to such corporation.

It appears that a similar deduction was claimed in your return for 1922 in the amount of $42,967.57 against the revenue received from properties owned jointly by A. W. and R. B. Mellon.

Adjustment has therefore been made in the agent's recommendation, which discloses the deficiency as noted below:

Ordinary income reported on return ...		$1,939,688.58
Add:		
1. Additional partnership income	$2,935.07	
2. Deduction for tax paid on Guffey Coal lands disallowed (½ of $42,967.57)	21,483.78	24,418.85
		$1,964,107.43

Deduct:		
3. Luxury taxes paid		5,551.18
Ordinary income as adjusted		$1,958,556.25
Capital net gain reported on return ..		99,866.19
Net income as adjusted		$2,058,422.44
COMPUTATION OF TAX		
Ordinary income adjusted		$1,958,556.25
Less:		
Dividends	$2,604,683.97	
Taxable interest on Liberty Bonds	1.46	
Exemption	2,400.00	2,607,085.43
Income subject to normal tax		None
Surtax on $1,958,556.25		$ 950,238.12
12½% on 99,866.19		12,483.27
		$ 962,721.39
Less: Tax withheld at source		1,934.62
Tax assessable		$ 960,786.77
Tax previously assessed		950,958.28
Deficiency		$ 9,828.49

Inasmuch as there is disclosed a deficiency in tax for the year 1922 as stated above, your claim for the refund of $913.39 will be rejected and the rejection will officially appear on a schedule to be approved by the Commissioner.

The four-year period provided by Section 277 (a) (2) of the Revenue Act of 1926 within which assessment of the deficiency may be made has expired. If, however, you agree to the aggregate deficiency as determined, you may make voluntary payment to the Collector of Internal Revenue for your district. If you do not agree to the adjustments as shown in the report, but are willing to make voluntary payment of the tax as finally determined, you may present protest to such adjustments, and if you so desire, an opportunity for a hearing before the Unit will be afforded you. In order that your case may be closed promptly, it is requested that any such protest and request for hearing be presented within ten days from the date of this letter.

Respectfully,

Deputy Commissioner.

Defendant's Exhibit "VV".

Feb. 16, 1928.

Mr. A. W. Mellon,
Woodland Road,
Pittsburgh, Pa.

Sir:

A review of the report submitted by the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, covering your tax liability for the year 1923, discloses a deficiency of $14,573.77.

If you acquiesce in the proposed adjustments, as shown in this letter and the accompanying statement, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:PL. In the event that you acquiesce in a part of such proposed adjustments, the form should be executed with respect to the items to which you agree.

If, however, you do not acquiesce in all of the proposed changes, you are granted a period of 10 days from the date of this letter to file a protest and request a hearing at Washington if desired.

The protest must cover all items which the taxpayer questions and may be accompanied by a statement of additional facts or by a brief or both. It must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer; (b) the designation by date and symbol of the letter advising of the tentative deficiency with respect to which the protest is made; (c) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (d) an itemized schedule of the findings to which the taxpayer takes exception; (e) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (f) in case the taxpayer desires a hearing, statement to that effect.

If no reply is received within the period mentioned above, it will be assumed that no hearing is

desired and the Bureau will proceed to close the case in the usual manner.

If, after said hearing and consideration by this office of evidence or briefs of argument submitted, the Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail, in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,

Deputy Commissioner.

Enclosures:
Statement
Form A.

STATEMENT

Feb 16 1928

	Deficiency
1923	$14,573.77

Reference is made to the report of the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, transmitted to this office under date of March 26, 1926, which has been reviewed and approved with the following exceptions:

The deduction of $52,052.50 claimed under the item "Rents and Royalties" A. W. and R. B. Mellon properties for taxes paid on the J. M. Guffey Company coal lands has been disallowed. As these taxes were paid for account of the corporation's properties, the amount is considered an advance to the corporation and does not constitute an allowable deduction.

Engineers' fees and commissions in connection with the survey of the Guffey Company coal properties are held to be in the nature of capital expenditures and therefore not deductible from current income. The amount of $24,923.07 as claimed for account of the A. W. and R. B. Mellon properties for such expenses has been disallowed.

In accordance with the analysis of the Gulf Oil Corporation Stock, "Account No. 3", H. A. Phillips, Agent, furnished by your representative, there has been included in your income for 1923 your proportionate share of the dividends received in the amount of $16,068.75; and in the loss of $30,182.50 as the result of sales under this account, has been allowed as a deduction to the extent of one-third.

Net income reported on return $2,368,319.68

Add:

1. Deduction for J. M. Guffey Coal Company, taxes disallowed (½ of $52,052.50) $26,026.25

2. Engineering fees disallowed (½ of $24,923.07)	12,461.53	
3. Dividends received (⅓ of $16,068.75)	5,356.25	43,844.03
		$2,412,163.71
Deduct:		
4. Additional distributive loss		
A. Overholt and Company	$ 2,718.39	
5. Additional taxes paid	3,241.65	
6. Increase in losses on sales of stock (⅓ of $30,182.50)	10,060.83	16,020.87
Ordinary income as adjusted		$2,396,142.84
Capital Net Gain reported		$ 159,594.64
Capital loss disallowed		47,380.00
Capital net gain as adjusted		$ 206,974.64
Ordinary income adjusted	$2,396,142.84	
Capital net gain	206,974.64	
	$2,603,117.48	

Computation of tax.

Net income adjusted		$2,396,142.84
Dividends	$4,802,208.73	
Exemption	2,400.00	4,804,608.73
Income subject to normal tax		None
Surtax on $2,396,142.84		$1,169,031.42
12½% on $206,974.64		25,871.83
		1,194,903.25
Less tax withheld at source		1,483.72
		1,193,419.53
Less 25% reduction, Section 1200, Revenue Act 1924		298,354.88
Tax assessable		$ 895,064.65
Tax previously assessed	$1,173,987.85	
Less 25% reduction	293,496.97	880,490.88
Deficiency in tax		$ 14,573.77

Explanation of Changes.

1 and 2. Your one-half share of the taxes and engineering fees paid in connection with the Guffey Coal Company lands has been disallowed for the reasons stated above.

3. Dividends have been increased by your one-third share in the Gulf Oil Corporation account designated as No. 3.

4. Distributive loss sustained through the partnership of A. Overholt and Company has been increased as a result of an examination of the partnership's records.

5. Customs tax paid.

6. Losses on sales of stocks has been increased by your one-third share in the results of sales in the Gulf Oil Corporation Account No. 3.

The 25% credit allowable under Section 1200 of the Revenue Act of 1924 has been computed in accordance with the decision in the appeal of the Estate of Philip M. Reynolds, United States Board of Tax Appeals, Volume 8, Page 360.

If the above adjustments are satisfactory, it is suggested that you execute and return to this office the enclosed agreement waiving the right to appeal and consenting to immediate assessment in order that your case may be closed without delay.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Mr. Eustace:

Defendant offers in evidence copy of Bureau letter, marked for identification as Defendant's Exhibit "WW", dated February 16, 1928, addressed to Richard B. Mellon, covering income tax liability for the year 1923.

Mr. Frazer:

We object to Defendant's Exhibit "WW", for the reason given yesterday afternoon in the objections to the exhibit last offered, it being merely a carbon copy of a letter unidentified by any person as having been sent, and not the best evidence; for the further reason it contains self-serving declarations, hearsay evidence; and as incompetent, irrelevant and immaterial.

The Court:

I will admit it temporarily, subject to later ruling.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "WW".

Feb. 16, 1928.

Mr. Richard B. Mellon,
514 Smithfield Street,
Pittsburgh, Pennsylvania.

Sir:

A review of the report submitted by the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, covering your tax liability for the year 1923, discloses a deficiency of $3,357.56.

If you acquiesce in the proposed adjustments, as shown in this letter and the accompanying statement, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:FAR:PL.

In the event that you acquiesce in a part of such proposed adjustments, the form should be executed with respect to the items to which you agree.

If, however, you do not acquiesce in all of the proposed changes, you are granted a period of 10 days from the date of this letter to file a protest and request a hearing at Washington if desired.

The protest must cover all items which the taxpayer questions and may be accompanied by a statement of additional facts or by a brief or both. It must be executed in triplicate, under oath, and contain the following information:

(a) The name and address of the taxpayer; (b) the designation by date and symbol of the letter advising of the tentative deficiency with respect to which the protest is made; (c) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (d) an itemized schedule of the findings to which the taxpayer takes exception; (e) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; and (f) in case the taxpayer desires a hearing, statement to that effect.

If no reply is received within the period mentioned above, it will be assumed that no hearing is desired and the Bureau will proceed to close the case in the usual manner.

If, after said hearing and consideration by this office of evidence or briefs of argument submitted, the

Commissioner finally determines that there is a deficiency, you will be advised thereof by registered mail, in accordance with the provisions of Section 274 of the Revenue Act of 1926. Should you not agree to the deficiency as finally determined by the Commissioner, you will be allowed 60 days from the date of mailing of the registered letter (not counting Sunday as the sixtieth day) in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,

Deputy Commissioner.

Enclosures:
Statement
Form A.

Feb. 16, 1928

In re: Mr. Richard B. Mellon,
514 Smithfield St.,
Pittsburgh, Pennsylvania.

	Deficiency
1923	$3,357.56

Reference is made to the report of the Internal Revenue Agent in Charge, Pittsburgh, Pennsylvania, transmitted to this office under date of March 26, 1926, which has been reviewed and approved with the following exceptions:

The deduction of $52,052.50 claimed under the item "Rents and Royalties" A. W. and R. B. Mellon

properties for taxes paid on the J. M. Guffey Company coal lands, has been disallowed. As these taxes were paid for account of the corporation's properties, the amount is considered an advance to the corporation and does not constitute an allowable deduction.

Engineers' fees and commissions in connection with the survey of the Guffey Company coal properties are held to be in the nature of capital expenditures and therefore not deductible from current income. The amount of $24,923.07 as claimed for account of the A. W. and R. B. Mellon properties for such expenses has been disallowed.

In accordance with the analysis of the Gulf Oil Corporation Stock, "Account No. 3," H. A. Phillips, Agent, furnished by your representative, there has been included in your income for 1923 your proportionate share of the dividends received in the amount of $16,068.75; and the loss of $30,182.50 as the result of sales under this account has been allowed as a deduction.

Net income reported on return		$ 720,619.09
Add:		
1. Deduction for J. M. Guffey Coal Company taxes disallowed (½ of $52,052.00)	$ 26,026.25	
2. Engineering fees disallowed (½ of $24,923.07)	12,461.53	
3. Dividends received (⅓ of $16,068.75)	5,356.25	

4. Miscellaneous taxes ...	337.81	44,181.84
		$ 764,800.93
Deduct:		
5. Additional distributive loss A. Overholt and Company	2,718.41	
6. Increase in losses on stock sales (⅓ of $30,-182.50)	10,060.83	
7. Contributions increased	34,486.48	47,265.72
Ordinary income as adjusted		$ 717,535.21
Capital net gain reported		$ 151,127.25
Capital loss disallowed .		47,380.00
Capital net gain as adjusted		$ 198,507.25
Ordinary income adjusted		717,535.21
Net income adjusted ...		$ 916,042.46

COMPUTATION OF TAX

Net income adjusted	$ 717,535.21
Dividends	3,366,249.26
Income subject to normal tax	None
Surtax on $717,535.21	$ 329,727.60
12 ½% on $198,507.25	24,813.41
	$ 354,541.01

Less: Tax paid at source ...		1,418.01
		$353,123.00
Less: 25% reduction, Section 1200, Revenue Act 1924		88,280.75
		$ 264,842.25
Tax previously assessed $348,646.25		
Less: 25% reduction	87,161.56	261,484.69
Deficiency		$ 3,357.56

EXPLANATION OF CHANGES

1 and 2. Your one-half share of the taxes and engineering fees in connection with the Guffey Coal Company lands has been disallowed for the reasons stated above.

3. Dividends have been increased by your one-third share in the Gulf Oil Corporation account designated No. 3.

4. The deduction for taxes has been reducted by items entered twice.

5. Distributive loss sustained through the partnership of A. Overholt and Company has been increased in accordance with the recommendation of the examining officer.

6. Losses on sales of stock have been increased by your one-third share in the results of sales in the Gulf Oil Corporation Account No. 3.

7. The amount of $127,168.07 deducted for contributions has been increased to the 15% limitation by considering capital net gain and increased ordinary income.

The 25% credit allowable under Section 1200 of the Revenue Act of 1924 has been computed in accordance with the decision in the appeal of the Estate of Philip M. Reynolds, United States Board of Tax Appeals, Volume 8, Page 360.

If the above adjustments are satisfactory, it is suggested that you excute and return to this office the enclosed agreement waiving the right to appeal and consenting to immediate assessment in order that your case may be closed without delay.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Mr. Eustace:

And for the same purpose, defendant offers in evidence Defendant's Exhibit "XX", being a copy of Bureau letter addressed to Richard B. Mellon, dated March 5, 1926, referring to an audit of the income tax return of R. B. Mellon for 1921.

Mr. Frazer:

Same objection to this letter, if the Court please.

The Court:

I am assuming here, as in the other case, that you have some evidence of their having been produced at least from a Government file.

Mr. Eustace:

It was understood that the testimony of Mr. Updike would extend to all of these exhibits.

The Court:

All right; I will overrule the objection for the time being, and note an exception.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "XX".

March 5, 1926.

MR. RICHARD B. MELLON,
514 Smithfield Street,
Pittsburgh, Pa.

Sir:

An audit of your income tax return for 1921, in connection with the Revenue Agent's report dated November 17, 1925, discloses an overassessment of tax in the amount of $1,833.65, details of which are as follows:

The report of the examining officer has been accepted with the following exceptions:

In accordance with the evidence presented in your protest, the loss on the sale of the stock of the Penn

Mining Company has been increased from $983.51, as shown by the agent, to $3,522.26.

The deduction for contributions has been decreased from $75,128.57, as shown by the agent, to $74,747.76, representing 15% of your corrected net income without the benefit of this deduction.

A recomputation of your tax follows:

Net income subject to surtax, as shown by the agent (no income subject to normal tax)		$425,728.59
Less: Increase in stock loss	$2,538.75	
Decrease in contributions	380.81	2,157.94
Corrected net income subject to surtax		$423,570.65
Surtax on $423,570.65		$215,359.51
Less 2% tax paid at source		1,826.87
Balance		$213,532.64
Tax previously assessed		215,366.29
Overassessment		$ 1,833.65

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid

income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the over-assesment does not indicate the amount which will be credited or refunded since a portion may be an unpaid assessment which has been entered but not paid.

Respectfully,

Assistant to the Commissioner.

Mr. Eustace:

And for the same purpose, defendant now offers Defendant's Exhibit "YY", being Bureau letter dated February 24, 1927, addressed to Mr. R. B. Mellon, referring to an audit of his income tax return for the year 1922, in which he was advised that a deficiency in tax was disclosed.

Mr. Frazer:

The same objection to Exhibit "YY."

The Court:

I will overrule the objection for the present, and note an exception.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "YY".

Feb. 24, 1927.

MR. R. B. MELLON,
514 Smithfield Street,
Pittsburgh, Pennsylvania.

Sir:

An audit of your income tax return for the year 1922 in connection with revenue agent's report dated March 26, 1926, discloses a deficiency in tax of $1,342.-52.

Inasmuch as your agent, Mr. D. J. Hicks, has executed an agreement in your behalf consenting to the assessment of the above deficiency, it will be entered on the next assessment list.

Payment of the additional tax should not be made, however, until a notice is received from the Collector of Internal Revenue for your district.

Respectfully,

Assistant to the Commissioner.

Mr. Eustace:

And for the same purpose, defendant offers Defendant's Exhibit "ZZ," being Bureau letter dated February 16, 1928, addressed to Mr. R. B. Mellon, referring to report of examination of his income covering the years 1922 and 1923.

Mr. Frazer:

The same objection.

The Court:

Objection overruled for the present and exception noted.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "ZZ".

Feb. 16, 1928.

MR. RICHARD B. MELLON,
514 Smithfield Street,
Pittsburgh, Pa.

Sir:

Reference is made to the report of the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, covering the years 1922 and 1923, dated March 3, 1926.

There was recommended therein a deficiency of $1,342.52 for the year 1922, which deficiency was assessed on March 5, 1927, in accordance with the signed agreement furnished at that time.

In the review of the report for 1923 and consideration of the account of J. M. Guffey on your books, the results of which you are being advised in a separate communication, it has been ascertained that there was claimed in 1922 as a deduction in the list of properties owned by A. W. and R. B. Mellon taxes on coal lands in the amount of $42,967.57, which appear to have been

paid on the J. M. Guffey Coal Company coal properties.

A deduction for a similar item is being disallowed in the year 1923 for the reason that such payments were made for the account of the corporation and are considered to be an advance to the corporation.

The result of a like adjustment in the year 1922 discloses a deficiency of $9,130.60 as shown by the following synopsis and tax computations:

Ordinary income shown in agent's report dated March 26, 1926, and basis of previous audit as per letter dated February 24, 1927	$ 238,203.99
Add:	
Taxes paid on J. M. Guffey Coal Company land (½ of $42,967.57)	21,483.79
	259,687.78
Deduct:	
Additional deduction for contributions —15% of additional income disclosed	3,222.57
Ordinary income adjusted	256,465.21
Capital net gain	99,866.19
Net income adjusted	356,331.40

Computation of Tax

Ordinary income adjusted	$ 256,465.21
Less: Dividends	1,292,555.77
Income subject to normal tax	None

Surtax on $256,465.21		99,192.60
12½% on $99,866.19		12,483.28
		111,675.88
Less: Tax withheld at source ..		1,887.12
Tax assessable		109,788.76
Tax originally assessed $99,315.64		
Deficiency assessed March 5, 1927	1,342.52	100,658.16
Deficiency		$ 9,130.60

The four-year period provided by Section 277 (a) (2) of the Revenue Act of 1926 within which assessment of the deficiency may be made has expired.

If, however, you agree to the aggregate deficiency as determined you may make voluntary payment to the Collector of Internal Revenue for your district. If you do not agree to the adjustments as shown in the report, but are willing to make voluntary payment of the tax as finally determined, you may present protest to such adjustments, and if you so desire, an opportunity for a hearing before the Unit will be afforded you. In order that your case may be closed promptly, it is requested that any such protest and request for hearing be presented within ten days from the date of this letter.

Respectfully,

(Signed) C. B. ALLEN,
Deputy Commissioner.

Thereupon counsel for defendant offered in evidence Defendant's Exhibits "AAA", "BBB", "CCC", "DDD" and "EEE", to each of which offers plaintiffs' counsel objected and same were admitted by the Court subject to future ruling. Said Exhibits "AAA", "BBB", "CCC", "DDD" and "EEE" are identical with Defendant's Exhibits "PP", "QQ", "MM", "NN" and "OO", respectively, save and except that Exhibits "PP", "QQ", "MM", "NN" and "OO" were in photostatic form duly certified under the seal and certificate of the Treasury Department pursuant to law, whereas Exhibit "AAA" to "EEE", inclusive, were offered in their original form. Inasmuch as Defendant's Exhibits "AAA", to "EEE", inclusive, already appear herein under identification as Defendant's Exhibits "PP", "QQ", "MM", "NN" and "OO", respectively, the same will not be here repeated.

Mr. Eustace:

Defendant now offers, for the same purpose, Defendant's Exhibit "FFF", being copy of Bureau letter in the files of Richard B. Mellon in the Bureau of Internal Revenue relating to his income tax return for the year 1921.

Mr. Frazer:

I object to that, for the reasons given in our objection to similar letters offered earlier by defendant.

The Court:

Admitted, subject to future ruling; exception noted.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "FFF".

IT:PA:1
WEL

MR. RICHARD B. MELLON, 1,833.65
514 Smithfield Street,
Pittsburgh, Pa.

1040

1921

Tax assessed #305876 ..... $215,366.29
Tax liability 213,532.64

Overassessment ..... $ 1,833.65

The report of the Examining Officer dated November 17, 1925 has been accepted with the exceptions outlined in a separate communication.

Thereupon counsel for defendant offered in evidence Defendant's Exhibits "GGG", "HHH", "III", "JJJ" and "KKK", to each of which offer plaintiffs' counsel objected, and same were admitted by the Court subject to future ruling. Said Exhibits "GGG", "HHH", "III", "JJJ" and "KKK" are identical with Defendant's Exhibits "II", "HH", "LL", "JJ" and "KK", respectively, save and except that Exhibits "II", "HH", "LL", "JJ" and "KK" were in photostatic form duly certified under the seal and certificate of the Treasury Department pursuant to law, whereas Exhibits "GGG" to "KKK", inclusive, were offered in their original form. Inasmuch as Defendant's Ex-

hibits "GGG" to "KKK", inclusive, already appear herein under identification as Defendant's Exhibits "II", "HH", "LL", "JJ" and "KK", respectively, the same will not be here repeated.

Mr. Eustace:

We now ask leave on behalf of the Bureau of Internal Revenue for permission to withdraw the original Exhibits "TT" to "KKK", inclusive, for the purpose of substituting photostatic copies, these being from the original files of the Bureau of Internal Revenue.

Mr. Frazer:

No objection to that.

The Court:

Very well; that may be done.

Mr. Eustace:

Defendant now offers Defendant's Exhibit "LLL", being the title page of a brief entitled "In the Matter of the audit of the federal income tax returns filed by Hon. A. W. Mellon and Mr. R. B. Mellon, of Pittsburgh, Pennsylvania, for the calendar years 1920 and 1925", together with that part of such brief beginning on page 13, under the heading "Liquidating Trustees of A. Overholt & Company and West Overton Distilling Company Were Taxable Entities", and the remainder of the brief.

Mr. Frazer:

What is the purpose of this offer.

Mr. Eustace:

The purpose of that offer is to show the position taken at that time by the plaintiffs in reference to their income tax liabilities for the years 1920 and 1925.

Mr. Frazer:

Objected to, as irrelevant, and immaterial to the issues in this case.

The Court:

It may be admitted, subject to future ruling, and exception.

Which said exhibit so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "LLL".

(Pages 572 a-672 h.)

BEFORE THE TREASURY DEPARTMENT

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON, D. C.

Filed Nov. 27 1929

In the Matter

of

the audit of the federal income tax returns filed by HON. A. W. MELLON and MR. R. B. MELLON, of Pittsburgh, Pennsylvania, for the calendar years 1920 and 1925.

BRIEF

HON. DAVID BURNET,
Commissioner of Internal Revenue,
Washington, D. C.

Sir:

At a recent conference in your office it was agreed that taxpayers' representatives would be granted a hearing before the General Counsel's office in connection with the profits of A. Overholt & Company and West Overton Distilling Company. The point at issue may be summarized as follows:

> The Commissioner of Internal Revenue erroneously included as taxable income in the year 1920, one-third of the profits of the liquidating agents of A. Overholt & Company and West Overton Distilling Company, dissolved partnerships in liquidation and he also erroneously included as taxable income for the year 1925, in determining the liquidating profits of A. Overholt & Company and West Overton Distilling Company, the profits and losses for the years 1920, 1921, 1922 and 1923.

a1

LIQUIDATING TRUSTEES OF A. OVERHOLT & COMPANY AND WEST OVERTON DISTILLING COMPANY WERE TAXABLE ENTITIES

The Revenue Act of 1918 provides:

"Sec. 219 (a) That the tax imposed by section 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including,-
* * *

"(3) Income held for future distribution under the terms of the will or trust;
* * *

"(4) (b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *."

"Sec. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one or two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

"Fiduciaries required to make returns under this act shall be subject to all the provisions of this act which apply to individuals."

"Sec. 200. That when used in this title--

"The term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate; ***

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[redacted]

The whole intent of the [redacted] is that the tax shall be paid by the fiduciary except where the income has been distributed periodically to the beneficiaries, in which case the beneficiaries shall pay the tax. It contemplates that the fiduciary shall have all deductions to which an individual would be entitled.

Article 343 of Regulations 45, promulgated under the provisions of the Revenue Act of 1918, provides that in the case of a trust the income is taxed to the fiduciary as to any single individual except that from the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary.

Article 1521 defines a fiduciary as follows:

> " 'Fiduciary' is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators, and a fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another as in the case of receivers."

Under the laws of the State of Pennsylvania the liquidating trustees of a partnership are fiduciaries within the meaning of that term as used in both the Revenue Act and the Regulations.

The fiduciaries in this case did not distribute any income in the taxable year 1920, and as a matter of fact, no one was entitled to receive any income during that taxable year. Therefore, the income, if taxable at all in the year 1920, is taxable to the fiduciaries and to them only.

The following cases hold that a fiduciary is a taxable entity:

Woolley, et al. v. Malley, 30 Fed. (2) 73, reversing 18 Fed. (2) 668, certiorari denied, 49 S. Ct. 418, U.S. 860. In this case it was held that where income from property which was ultimately to fall into the residuary estate and which

under the will was held in trust for beneficiaries and then distributed to them but which at the close of the taxable period had not been distributed, should be taxed to the executors.

Irene O'D. Ferrer, Petitioner, v. Commissioner, 20 B.T.A. 811. In this case the Board held:

> "Where an estate did not distribute income for prior years until 1921, held that income for those years is properly returnable by the estate and not by the beneficiary."

In a trust in which the income is added to the corpus and held for later distribution, the trustee must return the income, which is taxable to the estate and not to the beneficiary.

Merchants Loan & Trust Co. v. Smietanka, 255 U.S. 509, 65 L. ed. 751 (1921). Action in assumpsit to recover back federal income taxes brought by testamentary trustee under a trust providing for payment of net income to widow during life, after her death to be used for the benefit of children until each child should arrive at twenty-five years of age. The Court held that the testamentary trustee was a taxable person under the Revenue Acts of 1916 and 1917, and that accretions in selling value and the gain from sale of the property was taxable to the testamentary trustee.

Jobes v. Crooks, 33 Fed. (2) 1016 (1929) was an action by a trustee to recover back taxes paid. The Court held that where a declaration of trust gave the trustee discretion to distribute income to beneficiaries, and required the trustee to make such distribution on demand of a majority of the beneficiaries, any income not so distributed to be added to the corpus, income added to the corpus was taxable against the estate as income held for future distribution, although individual beneficiaries had included amounts earned by the trust estate in their return.

Busch v. Commissioner, 50 Fed. (2) 800 (1931) held that the fact that the trustee was also a beneficiary did not

prevent the creation of a trust estate within the Income Tax Statute, the trust being an entity separate from the beneficiaries. In that case it was said that a beneficiary, advancing money to himself as trustee for taxes on a trust estate, could not claim an income tax deduction on the theory that he was paying taxes on his interest in the trust.

In the case of the dissolution of a corporation title to the assets is vested in the stockholders but the assets are usually held by trustees for the purpose of collecting the assets, paying the debts of the corporation and the expenses of liquidation. The assets may be used by the trustees in whole or in part for the payment of debts. The stockholders' rights to the assets cannot be measured until the assets have been collected and the indebtedness discharged. The ownership of the assets of a partnership, after the death of a partner, is similar to the ownership by the stockholders of the assets of a dissolved corporation. In both cases the assets while vested in either the partners or the stockholders are held by liquidating trustees for the same purpose, to-wit, collecting the assets, paying the debts and the expenses of liquidation and distributing the balance to either the partners or the stockholders.

In the case of a dissolved corporation, it has been held that no taxes on profits can be assessed against the stockholders until the assets have actually been distributed. Wells Fargo Bank and Union Trust Co. v. Blair, 26 F. (2d) 532; Mrs. Grant Smith v. Commissioner, decided October 12, 1932, C.C.H. Decision No. 7768, Docket No. 43300.

In the Wells Fargo case, the Court held:

"The California courts, construing section 400 of the Code, hold that the trustees have no legal title to the assets of the corporation, but that upon dissolution the legal title to the assets of the defunct corporation is vested in the stockholders. This, however, is not decisive of the exact time when the stockholder realizes his income from the corporation. The assets are held by the trustees in liquidation for the purpose of the payment of the indebtedness and the expenses incurred in closing up the affairs of the corporation. The assets are in possession of the trustees for that purpose, and may be used in part or in whole by the trustees, if necessary, in liquidation of the liabilities of the corporation. It logically follows that the stockholders' rights to the property of the defunct corporation can only be measured when the property to which they are entitled is subject to distribution, which cannot occur until the assets of the corporation have been collected and its indebtedness discharged. For the collecting of the assets the trustees are given full and complete power, even 'to sue for and recover the debts and property of the corporation'. During this period the directors, as trustees, have the exclusive possession of the property of the corporation, and the power to sell or dispose of it for the purpose of liquidating and settling the affairs of the corporation. When all this has been accomplished, and the residue of the property of the corporation, belonging to the stockholders, remains in the hands of the trustees, then, and not until then, are the stockholders entitled to the possession of the assets under distribution."

In the Smith case, the Board approved the decision in the Wells Fargo case, and further held:

"Respondent * * * concedes that when the liquidating trustees, Hauser, Colman and Mrs. Grant Smith, took charge of the property of the corporation after the order of dissolution, it did not amount to a distribution of said property to the stockholders of said corporation, but respondent contends that, when the liquidating trustees entered into a trust agreement with the Metropolitan National Bank of Seattle, by which it was agreed that the Bank should complete the liquidation, which arrangement was concurred in by the administrators of the Estate of Grant Smith, deceased, and by the two beneficial owners

of the assets of said corporation, that this was a turning over of the assets of the corporation to the two stockholders, Mauser and Mrs. Grant Smith, and that although they did not actually receive these assets in 1935, they constructively received them in that year. Hence the transaction was taxable to petitioners. We do not agree to respondent's contention. We view the trust instrument entered into by the liquidating trustees with the bank as largely one of convenience by which the bank, because of its superior facilities, was to complete the liquidation, turning over to the stockholders of the corporation the proceeds resulting from sales, as fast as it was expedient to do so. Until the stockholders actually received the assets or the proceeds resulting from the sale thereof, there was no receipt by them."

CONCLUSION

It is respectfully submitted that the former partnerships of A. Overholt and Company and West Overton Distilling Company were dissolved by the death of the late H. C. Frick prior to 1930; that upon the death of Mr. Frick, Messrs. A. W. and R. B. Mellon, the survivors, became the liquidating trustees of these dissolved partnerships in liquidation, and as such, during the year 1930, were separate taxable entities; that the liquidating trustees had a reasonable time in which to liquidate the affairs of said companies; that the liquidation of said companies could not have been accomplished by the liquidating trustees during the year 1930, and because of legal and practical restrictions no distributions of partnership assets could have been made; that Messrs. A. W. and R. B. Mellon, individually, during the year 1930 kept their accounts and filed their income tax returns upon the so-called cash receipts and disbursement basis; and that no distribution

was actually made by the liquidating trustees to Messrs. A. W. and R. B. Mellon, individually, during the year 1920, and that therefore the profits of the liquidating trustees of the two partnerships should not be included in the gross income of the two surviving partners as individuals.

D. D. Shepard

Attorneys for Taxpayers

a. 19

Mr. Eustace:

Demand is now made on plaintiffs in these cases that the books of the partnerships of A. Overholt & Company and West Overton Distilling Company, showing the transactions for the years 1920 to 1925, inclusive, be produced, it having been previously agreed by counsel that the books would be produced in court.

Mr. Frazer:

The books are in court and are ready for submission to counsel for the Government, if the Court rules it is proper to do so. I think first they should state the purpose for which they wish the books and what they intend to prove by them.

Mr. Eustace:

We could have saved time if we could have had the books before.

Mr. Frazer:

They were here all day yesterday.

The Court:

Well, you have some purpose in demanding them, I presume.

Mr. Eustace:

The purpose of asking for the production of the books is to rebut the allegations of the statement of claim and in the Reply that no distributions were made of the partnership income until the final winding up of the affairs of the partnerships in 1925.

Mr. Frazer:

If the Court please, in Paragraph 20 of the statement of claim it is specifically stated that plaintiff "did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925". That was not denied by the defendant, and it was therefore admitted for the purposes of this case; and it is not proper for defendant at this time to attempt to prove that any distribution was made.

Mr. Eustace:

Calling attention to Paragraph 18 of the statement of claim, on page 6, where it is averred "although no part of the so-called profit from the liquidation of said partnerships was received from plaintiff until final distribution in the year 1925, nor was any part of said amount available to or subject to his demand", to which answer was made as follows—page 5 of the affidavit of defense: "Defendant denies that any part of said sums should not have been included as taxable income in plaintiff's return for the year 1920, and on the contrary alleges that the entire income of the partnerships of A. Overholt & Company and West Overton Distilling Company for the year 1920 was taxable to the plaintiff and to the parties interested in said partnerships, as provided in Section 218 of the Revenue Act of 1918"; and then, beginning down at the bottom of that page, second line from the bottom, "Defendant denies that no part of said sums was received by plaintiff until the year 1925, and denies that no part thereof was available to or subject

to plaintiff's demand, and on the contrary alleges that said sums were either received by the plaintiff during the year 1920 or were in all respects the property of the plaintiff available to him and subject to his disposition during said year."

Mr. Frazer:

If the Court please, in that Paragraph 18, if your Honor will examine it, the statement refers to $48,000 received from the operation of A. Overholt & Company and the sum of $5960 received from the West Overton Distilling Company, and those sums were actually—while they were not received by the plaintiffs in these cases, they were credited to them and accounted for by them in their income tax returns for the year 1920. That is all that has reference to in that paragraph 18. We admit that those—while we do not admit that we actually received those amounts, we did charge ourselves with them in our income tax returns for 1920. It is paragraph 20 that refers to the distribution from the liquidation of the company. It seems to me clear that paragraph 18 refers only to those two amounts for the year 1920.

The Court:

I think, since you have put that in, Mr. Frazer, they are entitled to deny that fact as to the $48,000.

Mr. Frazer:

We admitted that the $48,000 was taxable; we included it in our returns and paid the tax on it.

The Court:

But you have included it in this statement.

Mr. Frazer:

There is no claim for refund on that. Our only claim is for the $190,000 in one case, and $180,000 in the other, which were additional taxes assessed by the Commissioner. We make no claim for refund on the $48,000.

The Court:

Why was it put in your statement?

Mr. Frazer:

The statement there is merely what we paid; and your Honor will see, if you read further along, paragraph 19: "The Commissioner increased plaintiff's share of the so-called net income or profits during the liquidation of A. Overholt & Company and West Overton Distilling Company for the year 1920 from $48,-350.74 and $5,960.55 as reported on the return to $281,-779.95 and $52,814.28 respectively." Now, it is only the additional assessment referred to in paragraph 19 that we are suing to recover here.

The Court:

What have you to say to that, sir?

Mr. Eustace:

We still insist that we have the right to rebut the allegation of the statement of claim which is denied, and for that reason we insist that the books should be produced and we be given the opportunity to offer them in evidence for that purpose. This is part of the issues in this case.

The Court:

How are they? That is exactly the point on which I would like you to enlighten me, if you can.

Mr. Eustace:

Well, I think we could expedite this matter considerable, if your Honor please, if we could have the books for about five minutes, and then we could point out exactly what part we wish to introduce in evidence. It would simplify the matter greatly and expedite this trial.

The Court:

This is rather a serious question. I think, before a party might be entitled to go through his opponent's books for the purpose of investigating, he ought to show what the materiality is of the subject matter which he wants to introduce or expects to introduce from them.

Mr. Eustace:

We believe we have already done that by the statement of claim with reference to these allegations—the statement of claim and the denial.

The Court:

Well, I am afraid, if you cannot make me believe it, I will have to rule against you. I will overrule your motion and give you an exception. That paragraph 20, of course is no denial whatsoever of the general allegation there; that other relates to what does seem to me to be an immaterial part of this particular answer, because there is no part of it to recover the amounts named in that eighteenth paragraph.

Mr. Eustace:

With reference to paragraph 20, may I call the Court's attention to this denial: In the latter part of the paragraph of the statement of claim it is stated that "on the profits so reported (referring to the two partnerships), although he did not actually receive any payment from the liquidating trustees until final distribution in liquidation in the year 1925", which the defendant has denied in the last sentence—I beg your pardon, if the Court please. Paragraph 20, that is a conclusion, requiring no denial.

The Court:

No, that presents your conclusion of the matter.

Mr. Eustace:

But the latter part of paragraph 22 contains this sentence—in the statement of claim—"The amounts actually received in liquidation in the year 1925 included the so-called profits and losses of the liquidating agent for all said prior years." That has been denied in the affidavit of defense, in the last four lines of paragraph 22. And if it is necessary, to make that a good defense, defendant now asks leave to amend by adding thereto: "and on the contrary avers that the amount actually received by the plaintiff in the year 1925 in liquidation of his investment in said partnerships included the profits and losses of the two partnerships for the year 1925 and for all prior years, less such amounts as may have been distributed during prior years."

Mr. Frazer:

We object to the amendment of the affidavit of defense at this time: first, because it is too late, the defendant having waited until the conclusion of his case before doing so; and second, because it is contrary to the admission by defendant of the averments of paragraph 20 of the statement of claim.

The Court:

I will allow the amendment, noting an exception to the plaintiff in each case.

Mr. Eustace:

And defendant now asks leave to inspect the books of the partnerships of A. Overholt & Company and West Overton Distilling Company, for the purpose of more readily indicating the items which are necessary to support the proof to rebut the allegations in the statement of claim with reference to distribution.

The Court:

All right; the books being in court, the plaintiffs are directed to deliver them to the defendant.

Mr. Frazer:

Your Honor will allow us an exception?

The Court:

Yes; an exception is noted to the plaintiffs.

(Short recess taken at this point.)

Mr. Eustace:

If the Court please, we have in the short time during the recess of the court made an examination of the

bills receivable account in the ledger of A. Overholt & Company, and been able to check it back through the journal entries and cash book entries, only for the year 1920; and if it would be of any assistance to the Court, it will be necessary to analyze that account until the final winding up of the affairs of the partnership in 1925; and we might go ahead with another line of proof, which connects up with the last exhibits introduced, while the revenue agent is making that analysis, and then we can offer the testimony very briefly.

The Court:

All right; you may do that.

E. L. Updike—Recalled.

Thereupon, E. L. Updike, was recalled as a witness on behalf of the defendant and, having been previously duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Eustace:

Q. Mr. Updike, when you were on the stand yesterday, I believe you testified in connection with your qualifications,—that is, you have served for a period of eight years, beginning as accountant and later as an auditor, and I don't recall the other duties which you said you had?

A. I started in September, 1920, as assistant auditor, in various positions for approximately eight years,

rated from assistant auditor to assistant chief accountant and auditor.

Q. Will you state what your duties were in those positions with reference to making computations in connection with income tax returns of taxpayers?

A. The examination of all of the papers in the file at Washington, including the income tax returns, the agents' reports, correspondence or any other documents, and determining the tax liability of that particular taxpayer for that year—computed the tax, rather, and prepared the preliminary deficiency letters, and the final deficiency letters, setting forth the Commissioner's determination of the particular taxpayer's tax liability.

By Mr. Shepard:

Q. Then do I understand you made the determination, you say?

A. No; preparing the letters setting forth the Commissioner's determination.

By Mr. Eustace:

Q. During what period of time—or for how long a time, rather—were you engaged in that kind of work?

A. Approximately eight years in that type of work mainly.

Q. I will now ask you, Mr. Updike, whether or not you have made a computation in accordance with Bureau letter dated March 15, 1929, which is in evidence, eliminating yearly gains and losses, for the period from December 1, 1919, to December 31, 1924,

and taxing the balance of profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, in connection with the income tax liability of A. W. Mellon?

A. I have.

Q. Will you state the result of that computation?

Mr. Frazer:

Just a minute. I object to that. Perhaps we had better ask for a statement of the purpose of counsel for the Government.

Mr. Eustace:

We stated the purpose when we were offering the exhibits yesterday,—that, admitting it to be true as to everything that you contend for with reference to the year 1925, we would show by this computation that even though you were correct the plaintiffs have underpaid their tax for the year 1925, for which they are now seeking a refund.

Mr. Frazer:

If the Court please, I object to this computation, for the following reasons: First, we are not seeking a refund for the 1925 tax in this case, it is for the 1920 tax; second, because the purpose of this offer is not pleaded in the affidavit of defense or the amended affidavit of defense; third, neither this witness nor the Court has authority or power under the statutes to determine and assess a tax against plaintiff on the basis outlined in the offer; fourth, because any attempt to assess such a tax against plaintiff at this time is barred

by the statute of limitations; fifth, because this offer is a shifting of the position of the Commissioner for about the fourth time and is not proper in this proceeding; sixth, because it is an attempt to attack collaterally the 1925 tax by the Commissioner; seventh, because the offer as I understood it—the offer of all of these exhibits, rather, was for the purpose of showing estoppel on the part of the plaintiffs, and not for the purpose in the offer; eighth, generally as incompetent, irrelevant and immaterial.

The Court:

Where in your pleadings do you have any matter which would serve as a foundation for this testimony?—Well, I don't know that you need to show that, because I cannot quite see how you could get it in, in any event, in order that it could serve as a set-off—

Mr. Eustace:

It is not for that purpose.

The Court:

Well, if it is not for that, what is it?

Mr. Eustace:

The charge is made in the statement of claim —we were just looking for it—on the theory of the plaintiff, by reason of the action of the Commissioner by asserting a deficiency for 1920, which is the subject of this suit, and the asserting of a deficiency for 1925 on the amounts that the plaintiff

returned, resulted in double taxation on the same income; and we will show by this proof that there has been no double taxation. It is in rebuttal of that allegation in the statement of claim.

The Court:

But that is attacking a direct assessment.

Mr. Eustace:

Not attacking a direct assessment, but setting up the equity side of it; and if the plaintiffs have not in fact overpaid their tax, they haven't anything—

The Court:

Here are specific taxes that are the subject matter of the suit.—

Mr. Eustace:

Let me explain just a little bit farther: The Court will recall that during the time of the reading of the pleadings we objected to certain of the allegations which we stated were immaterial. Everything with reference to any year other than the year 1920 we were contending, and we still contend, are immaterial; but if the Court should determine we are wrong about that, then we don't want to be left without proof supporting the Government's side of the issues with reference to facts necessary to refute those allegations, if they are material. If they are not material, they can be disregarded. It also comes under the Third Defense which we set up, treating it as a trust, which they now claim it was.

Mr. Frazer:

If the Court please, the tax was assessed for 1920 and paid; the tax was assessed for 1925 and paid. In both cases that tax was assessed by the Commissioner. The Commissioner has had plenty of opportunity to correct his assessment in each case, if he saw fit to do so; he has not done so. And certainly the determination of the tax cannot be attacked collaterally in this proceeding at this time, and certainly they cannot set off on our claim on a statement of this kind, claim that we have not overpaid our 1925 tax.

Mr. Eustace:

In paragraph 28, if the Court please, of the statement of claim they claim double taxation, and that is one of the paragraphs on which we made the objection as irrelevant and immaterial, and on which we say that if the Court decides adversely to our contention in that respect, then we are left without any proof rebutting the inference at least of the allegation in the statement of claim.

The Court:

Now, let us see if we understand each other. They allege that they were assessed for the year 1920 a certain tax; they allege that on the same subject matter, or on the same income, of whatever nature it is, they were also assessed upon the same subject matter for the year 1925, a tax,—in other words, a double taxation. They seek to recover the 1920 tax, since it is their theory that that is the

one which was wrongfully collected. Now you expect to prove by this witness that for other years, and at other times, and wherever there has been an assessment, that there was an error in the assessment, or in the return and the assessment for other years. Is that the scope of your offer now?

Mr. Eustace:

This proof will show that, taking the amount determined by the Commissioner as the amount for 1925, which plaintiffs now contend included the incomes for the year 1920 and the incomes and losses for the intervening years, we propose to deduct those amounts in this computation and to show that the tax on the remainder amounts to more than the plaintiffs claim they are entitled to have back for 1925.

The Court:

Unassessed?

Mr. Eustace:

For the year 1925, for which they have a claim for refund pending.

Mr. Frazer:

May I say just a word, if the Court please? Our allegation is that we paid a tax on this liquidating income in 1920 under an assessment by the Commissioner, and that he also included the same income or liquidating profits—whatever you call it—in plaintiffs' income for 1925, and then "he has assessed and collected a tax on the same income in

each of said years." Now this testimony would not contradict that at all. They don't deny that we have paid the tax on the same income in two years; all they are doing now is to make some recomputation here, which is not binding upon the Commissioner or anybody else, to indicate that perhaps if they had assessed it on a different basis in 1925 the result would have been different. It doesn't rebut our allegation that we were assessed and paid this tax on the same money in two different years.

The Court:

I cannot see how it is admissible at all, gentlemen. I shall have to sustain the objection, and note you an exception.

Mr. Eustace:

At this time the defendant offers to prove by this witness that a computation of the tax of the plaintiff A. W. Mellon for the year 1925, in accordance with Bureau letter dated March 15, 1929, eliminating yearly gains and losses for the period December 1, 1919 to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, will show that the plaintiff A. W. Mellon has underpaid his tax for the year 1925 in the amount of $81,971.53.

Mr. Frazer:

I object to that offer, for the reasons given just previous to this question; I renew my objection.

The Court:

That offer does not contemplate actual assessments formally made by the Commissioner.

Mr. Eustace:

No.

The Court:

The objection is sustained, and exception noted.

Mr. Eustace:

Defendant now offers proof by this witness that in connection with the income tax of R. B. Mellon for the year 1925 a computation in accordance with Bureau letter dated March 15, 1929, eliminating yearly gains and losses for the period from December 1, 1919, to December 31, 1924, and taxing the balance of the profits in liquidation of A. Overholt & Company and West Overton Distilling Company as ordinary income, will show that R. B. Mellon underpaid his tax for 1925 in the amount of $48,232.62.

Mr. Frazer:

We object to that offer, for the same reason.

The Court:

Objection sustained, and exception.

Thereupon, the witness was excused.

Testimony of Donald A. Banks.

Thereupon, Donald A. Banks was called as a witness on behalf of the defendant and, having been first duly sworn, was examined and testified in substance, as follows:

Direct Examination:

By Mr. Zeutzius:

My name is Donald A. Banks. I am an internal revenue agent and reside at Pittsburgh, Pennsylvania. I have been an internal revenue agent and acting as such since March, 1922. My duties during all of the time since 1922 have consisted of examining books and records of individuals and corporations in order to ascertain their income tax liability.

Q. Directing your attention to Plaintiffs' Exhibit No. 3, being a partnership return on form 1065 for the period January 1, 1920, and ending December 31, 1920, of A. Overholt & Company, which is already in evidence, and specifically to Schedule "E" attached thereto, being the balance sheet of A. Overholt & Company, and the item of Bills Receivable which is shown thereon as of January 1, 1920, in the sum of $1,915,000, and as of December 31, 1920, in the sum of $2,665,600, can you tell from an examination of the books of A. Overholt & Company just how that increase occurred in bills receivable?

Mr. Frazer:

If the Court please, I understand that my former objection applies to this testimony, or shall I make additional objection?

The Court:

Well, I don't remember just what the condition of the record is, Mr. Frazer.

Mr. Frazer:

Well, to clarify it then, I object to any testimony as to bills receivable of A. Overholt & Company, as immaterial and irrelevant, and not tending to show any distribution of assets of A. Overholt & Company to the partners, or surviving partners, or any other person.

Mr. Zeutzius:

That is the very thing, your Honor, that this testimony will tend to show.

The Court:

We will overrule the objection for the present, and note an exception.

A. Why, this schedule shows an increase in bills receivable between January 1, 1920, and December 31, 1920, of $750,000.

Q. Have you examined the books?

A. I examined the bills receivable account in the A. Overholt & Company ledger.

Q. Now, in connection with that examination, will you state what is shown by the books with respect to the increase in that item during the year 1920?

Mr. Frazer:

It seems to me, if the Court please, the best evidence is the production of the books, themselves.

The Court:

He must, of course, be shown to have made definite examination of the books, and show that his testimony is based upon that examination and is a summary of what he found in the books. Of course the books may speak for themselves in that respect, and may not, I don't know.

Q. Will you kindly get the books showing the accounts receivable, which you examined?

(The books of the A. Overholt & Company and West Overton Distilling Company were in court pursuant to agreement between counsel.)

A. (Witness produces book.) This is the general ledger—

Mr. Frazer:

If the Court please, so that the record may be straight, I object to the testimony as to bills receivable from the books of the company, as irrelevant and immaterial.

The Court:

The objection is overruled for the present, and exception noted.

Q. Will the witness find in the general ledger of A. Overholt & Company the account entitled "Bills Receivable," representing the item referred to beginning with January 1, 1920, to the closing of the account?

A. Here it is (indicating), in the ledger, page 8, of A. Overholt & Company.

Mr. Zeutzius:

I now offer in evidence from the original ledger produced by counsel for plaintiffs the account

entitled "Bills Receivable," from page 8 thereof, commencing with January 1, 1920, down to and including the closing thereof on February 11, 1926.

Mr. Frazer:

Objected to, as irrelevant and immaterial, and not tending to show distribution of partnership funds to the partners.

The Court:

We will overrule that objection for the present, and note an exception.

Which said defendant's exhibit, marked "MMM," so offered and admitted in evidence is in words and figures as follows:

Defendant's Exhibit "MMM".

(Page 592 a.)

Bills Receivable

Dec	30	From Old Ledger		2273650005	June	11	Earl (R3M)	3		22640	
Mch	16	Earl (R3M)	16	1500000	Feb	13	" " "	10		37	01
June	7	" (R3M)	34	150000	Mch	10	" " "	18		226	08
	13	" (R3M)	34	1000000	April	17	" " "	22		130	44
Sept	11	" (R3M)	34	500000	May	14	" " "	27		134	37
					June	6	" " "	30		89	52
					Sept	15	" (A.W.Mellon)	36	34	306	25
					Nov	3	" (R3M)	38	4	50000	
					Dec	15	" " "	40	1	00000	
						31	BALANCE BROT. DOWN		19	15000	
				2408650005					240	8650	05
Dec	31	BALANCE BROT. DOWN	/	1915000000	Jany	11	Earl (R3M)	43		50000	00
Jany	21	Earl (R3M)	43	50000		3	Earl (" ")	51		35000	00
Aug	4	" D Schenley	59	600000		10	" (" ")	41		35000	00
	2	Earl (R3M)	61	1000000		19	" (" ")	41		30000	00
Sept	14	" (R3M)	65	400000	Dec	31	BALANCE BROT. DOWN		266	5600	00
	14	" (R3M)	65	900000							
	23	" (Mrs R3)	66	1000000							
Oct	7	" (R3M)	69	400000							
Nov	11	" (R3M)	70	100000							
	13	" (R3M)	70	500000							
	19	" (R3M)	70	500000							
Dec	13	" (R3M)	71	500000							
				2815600							
Dec	31	BALANCE BROT. DOWN		2665600	Jany	15	Earl (R3M)	75		100000	
Jany	10	Earl (A.W.M.)	76	400000	Feby	7	" (A.W.R3M)	76		250000	
	10	" (R.3.M)	76	400000		7	" (A.W.M.)	76		400000	
	10	" (H.C.Frick Est)	76	400000		7	" (R.3.M.)	76		850000	
					July	1	" (R3M)	81		200000	
					Nov	13	" (H.C.Frick Est)	86		100000	
						13	" (A.W.M.)	86		100000	
						13	" (R.3.M.)	86		100000	
					Dec	31	Bal Brot Down		257	60000	
				3865600					386	5600	
Dec		Bal Brot Down		2570600	Jany	13	Earl (H.C.Frick Est)	88		100000	
						13	" (A.W.M.)	88		100000	
						13	" (R.3.M.)	88		100000	
					April	21	" (A.W.M.)	92		100000	
						21	" (R.3.M.)	92		100000	
						21	" (H.C.Frick Est)	92		100000	
					May	3	" (H.C.Frick Est)	93		100000	
						3	" (A.W.M.)	93		100000	
						3	" (R.3.M.)	93		100000	
					Dec	30	BALANCE BROT. DOWN		248	60000	
				2570600	1925				257	60000	
Dec 1925	30			2480600	Aug	19	J.E. Profit & Loss (1924)	158		600	
Aug	19	J.E. Old Ledger (1924)	157	175000	Dec	21	Est. H.C. Frick	161		400000	
	19	" " "	157	175000	Feb 1926	1	Cash - A.W. Mellon	62		950000	
							" R.B. Mellon	62		930000	
							" Est. H.C. Frick	62		550000	
				2830600						2830600	

I examined that account for the entire period and find with respect to 1920 that the books show a debit balance in the bills receivable account of A. Overholt & Company on January 1, 1920 of $1,915,000; that there were credited to the bills receivable account of the A. Overholt & Company, as moneys paid back to it by R. B. Mellon, the sums of $35,000, $35,000 and $30,000 on January 3, 10 and 19, 1920, respectively. On January 21, 1920, there was a credit item in this account of $50,000 which tended to reduce the amount R. B. Mellon owed to the company and at the same time was charged to expenses on the books of the company as of January 21, 1920. During the year 1920, the books show that there was paid to A. W. Mellon $400,000 in cash, and the amount was credited to cash and debited to the bills receivable account; also that R. B. Mellon received $400,000 in cash, which was debited to the bills receivable account and credited to cash; also that A. W. and R. B. Mellon jointly received $100,000, debited to bills receivable and credited to cash. In the same way R. B. Mellon paid back the total sum of $150,000 to the partnership on January 3rd, 10th, 19th and 21st, 1920. To summarize the net result for the entire year of 1920, the bills receivable account for 1920 had increased $750,000. That was occasioned by payments of $900,000 to A. W. and R. B. Mellon, and a payment to the partnership by R. B. Mellon of $150,000, or a net of $750,000 for the year. The $150,000 is explained in the cash book, showing payments of cash, which I have examined. By way of explanation of those payments to the Mellons in 1920, the cash book of A. Over-

holt & Company shows that on January 21, 1920, $5,000 was paid to R. B. Mellon, credited to cash and charged to bills receivable, with the notation "R. B. Mellon account loan." That ordinarily would mean that the partnership loaned R. B. Mellon $5,000, and it was set up as a bills receivable on the books of the company. The cash book shows, p. 61, that on August 2, 1920, cash was credited $100,000, bills receivable debited $100,000, with the notation "R. B. Mellon account loan." The cash book explanation is that the partnership loaned R. B. Mellon $100,000 and set it up on their books as bills receivable. The cash book, p. 65, shows that on September 14, 1920, $400,000 was paid to A. W. Mellon, cash credited, bills receivable debited, with the notation "A. W. Mellon loan," and the same day there was paid to R. B. Mellon $90,000, bills receivable debited, with the notation "R. B. Mellon loan." The cash book explanation is that the partnership loaned A. W. Mellon $400,000 and R. B. Mellon $90,000. The cash book shows, p. 66, that on September 23, 1920, cash was credited $100,000, and bills receivable debited $100,000, with the notation "A. W. and R. B. Mellon loan." The cash book explanation of that is that it was a loan by the partnership to A. W. and R. B. Mellon jointly. The cash book, p. 69, shows that on October 27, 1920 the partnership paid R. B. Mellon $40,000, credited cash and debited bills receivable, with the notation "R. B. Mellon account loan." That is explained as a loan of $40,000 to R. B. Mellon by the partnership. The cash book, p. 70, shows that on November 11, 1920, the partnership paid R. B. Mellon $10,000,

credited cash and debited bills receivable, with the notation or explanation "R. B. Mellon account loan," which would mean a loan by the partnership to R. B. Mellon. The cash book, p. 70, shows that on November 13, 1920, $50,000 was paid, cash credited and bills receivable debited with the notation "R. B. Mellon account loan," evidently a loan from the partnership to R. B. Mellon of $50,000. The cash book, p. 70, shows that on November 19, 1920, $50,000 was paid to R. B. Mellon with the notation "R. B. Mellon account loan." That is explained as evidently a loan to R. B. Mellon by the partnership. The cash book, p. 72, shows that on December 13, 1920, $55,000 was paid to R. B. Mellon, bills receivable debited, cash credited, with the notation "R. B. Mellon account loan"; evidently a loan to R. B. Mellon. That concludes all of the charges to the bills receivable account for 1920 there are also some credits, that have been explained.

Cross Examination:

By Mr. Frazer:

Q. I call your attention again to page 8 in the bills receivable book (Defendant's Exhibit "MMM," *supra)* and ask you what that shows as to repayment of loans in January and February, 1921, by Mr. A. W. Mellon, Mr. R. B. Mellon, and A. W. and R. B. Mellon?

A. The bills receivable account in the general ledger is credited on January 25, 1921, to the extent of $10,000, showing that R. B. Mellon repaid the partnership $10,000 cash. February 7, 1921, the account is credited with $450,000 cash received from A. W. and

R. B. Mellon jointly; February 7, 1921, the account is credited with $400,000 cash received from A. W. Mellon; February 7, 1921, the account is credited with $385,000 cash received from R. B. Mellon.

Re-direct Examination:

By Mr. Zeutzius:

Q. You have been questioned concerning the items credited in 1921, described as repayments by the plaintiffs. What is the total amount for 1921 so described on the accounts receivable account?

A. The total repayments for the year 1921, $1,295,000.

Q. Please state whether or not there were any payments to Messrs. R. B. and A. W. Mellon during 1921.

Mr. Frazer:

I object to this, as irrelevant and immaterial. We are dealing with the year 1920 and not with the year 1921.

Mr. Zeutzius:

In that connection, my good friend has introduced the credit side of the ledger for 1921; he now objects to the debit side, which shows—or whereby I offer to show the amount paid to the Messrs. Mellon in 1921 approximately equaled the amounts that purport to have been repaid, so that the situation will be as to 1920 that nothing has been repaid as to the distributions made in 1920, testified to in direct examination by the witness.

The Court:

The objection is overruled for the present, and an exception noted.

A. In 1921 there were cash payments on February 10 to A. W. Mellon $400,000, $400,000 to R. B. Mellon the same date, and $400,000 to H. C. Frick Estate on the same date.

By Mr. Frazer:

Q. Were there additional payments made to the partnership by the repayment of borrowed money during the year 1921?

A. In 1921?

Q. In 1921, in addition to those you have testified to?

A. Yes. You asked me—

Q. Only as to February 7?

A. Yes; and then from July to December. In July and November there was $50,000 repaid by the individuals.

Q. Were there additional repayments in the year 1922?

Mr. Zeutzius:

I don't like to be in position of objecting, because as we carry this on to the conclusion I think it will appear that at no time did the so-called repayments equal the payments of the distributions, or overcome them.

The Court:

Well, you can show it by the accounts or in some way by synopsis.

Mr. Frazer:

I can do it in just a minute's testimony, if the Court please.

The Court:

All right; the objection is overruled.

A. In the year 1922 the ledger account shows $90,000 repaid to the partnership by the individuals.

Q. You say payments to the partnership; you don't mean by that payments on account of loan?

A. Cash received by the partnership and credited to the bills receivable account. All payments by the partnership or by the individuals were in the bills receivable account on the ledger of the corporation, either debited or credited.

Q. And that indicates that they were payments on account of the loans shown on the other side of the ledger?

A. Yes.

Mr. Zeutzius:

With respect to the book, of course we will ask that the book or books remain until a transcript can be taken of the account which has been offered.

Mr. Frazer:

If the Court please, we will furnish a photostatic copy of that page, if that will be satisfactory.

Mr. Zeutzius:

That is satisfactory.

Mr. Frazer:

Then it is agreed that a photostatic copy may be substituted for the page offered.

The ledger page referred to is that which was previously offered, marked Defendant's Exhibit "MMM."

Thereupon the defendant rested.

The plaintiffs in each of said consolidated causes thereupon offered the following as their evidence in rebuttal:

Mr. Frazer:

If the Court please, the defendant having offered a number of exhibits on the theory that this tax should be rightly collected from the trust, for the purpose of showing that the Estate of Henry C. Frick has been distributed, and that if this were done there could be no contributions from the Estate to the surviving partners, I now offer in evidence certified copy of decree of the Orphans' Court of Allegheny County at No. 251 December Term, 1931, the decree being entered on December 24, 1931, for the purpose of showing final distribution of the estate at that time to the residuary legatees, except as to the sum of $5,000 distributed to the accountants, or executors, for any additional federal income tax, personal property tax or other obligations, and the surplus to follow this decree. This is offered as Plaintiffs' Exhibit No. 5.

Mr. Eustace:

To which the defendant objects, for the reason it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issues involved in this case; is hearsay, and not binding on the defendant.

The Court:

The objection is overruled and exception noted.

Which said plaintiffs' exhibit, so offered and admitted in evidence, is incorporated herein by reference and made part hereof, the original of said exhibit having been duly certified to the Circuit Court of Appeals with the transcript of record and as part thereof, pursuant to stipulation between counsel and an order of this Court that said exhibit be sent up in its original form, with, and as part of, the transcript of record, as appears elsewhere herein.

Testimony of John G. Buchanan.

Thereupon, John G. Buchanan was called as a witness in rebuttal on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Frazer:

Q. Mr. Buchanan, you are a member of the bar of Allegheny County?

A. Yes, sir.

Q. And have been practicing for some years?

A. Yes, sir.

Q. You are a member of the firm of Smith, Buchanan, Scott & Gordon?

A. Yes.

Q. You have done a considerable amount of work in connection with income and estate taxes?

A. Some work, yes.

Q. Did you represent the Estate of Henry C. Frick in connection with its settlement of income and estate taxes?

A. Yes; more particularly, its income taxes, although to some extent its estate taxes as well.

Q. In connection with income and estate tax on the Estate of Henry C. Frick, did you have up with the Bureau of Internal Revenue at Washington the question of the taxes growing out of the liquidation of A. Overholt & Company and the West Overton Distilling Company?

A. I did.

Mr. Eustace:

Just a moment. That is objected to, as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issues involved in this case, and not proper rebuttal testimony.

Mr. Frazer:

If the Court please, they have introduced a great number of certified copies of letters, records, returns, and so forth; and it is our purpose by this

testimony to show that the Department at Washington settled the tax against the H. C. Frick estate on the basis that the sale of the assets in liquidation was a sale of capital assets and was taxable in the year 1925, the year of liquidation; that when this settlement was proposed it was communicated to counsel for A. W. and R. B. Mellon, the other partners, who agreed that the settlement should be made on that basis, and that was communicated to the representatives of the Department at Washington; the purpose being to show that at this time it would be unjust, inequitable and unfair to change the basis of settlement to a different one, and to compel the partners to have settlement on a different basis.

Mr. Eustace:

If the Court please, the basis for computing the gain or loss in connection with arriving at the income tax due from an estate is on a different basis and under a different statute entirely from that involving individuals, and the basis of values is entirely different; and this offer of testimony has no relevancy or materiality to any of these issues. The Estate of Henry C. Frick is not a party to this proceeding, and is not involved, and any action that the Commissioner may have taken with reference to that taxpayer does not preclude the Commissioner from taking a correct action against some other taxpayer; and we insist upon the objection.

Mr. Frazer:

If the Court please, I do not understand there is any difference in settlement with an estate and settlement with an individual in the liquidation of a partnership, as in this case. It is a question of income and tax in the year in which the income is received.

The Court:

These were individual returns, however, were they not, that is, of the various individuals?

Mr. Frazer:

Yes.

The Court:

I have my doubts, but I have been allowing everything to go in, and will rule on it a little bit later; and we will get along better without much discussion on it, I take it, now. I will allow it to go in, and note an exception.

Q. When was the settlement made with the Bureau of Internal Revenue in connection with Mr. Frick's income taxes on this liquidation?

Mr. Eustace:

Same objection.

The Court:

Well, you should understand that you have an exception granted to the whole subject matter.

A. In the year 1928.

Q. Had you had the matter under discussion for some time prior to that with the Department?

A. Yes.

Q. What was agreed to between the Estate and the Department with respect to the taxes on this liquidation?

A. The settlement was first discussed in a letter from the Bureau of Internal Revenue of September 14, 1927—

Q. Do you have that letter?

A. I have a copy of that letter, which was addressed to me as counsel for the Estate; not the original, but a copy transmitted with a letter from the Bureau of Internal Revenue. The letter covered the income taxes of the Estate of Henry C. Frick from December 3, 1919, being one day after Mr. Frick's death, to the end of the year 1923 The basis of taxing income from the liquidation of A. Overholt & Company and West Overton Distilling Company is shown by a comment under the heading "Period December 3 to 31, 1919"—Shall I read that comment into the record?

Q. If you will, please.

Mr. Eustace:

Just a moment. That is objected to. If this exhibit is competent, it should be offered and received in evidence, so that it may become a part of the record.

Mr. Frazer:

I will have the whole letter offered, if you want.

Mr. Eustace:

We will make an objection to it, and also to the reading from the letter, on the basis of the objection previously made.

The Court:

The objection is overruled, and exception noted, for the present.

Which said letter and attached statement was thereupon marked "Plaintiffs' Exhibit No. 6," and is in words and figures as follows:

Plaintiffs' Exhibit No. 6.

Sep 14 1927

IT:FAR
PL
H. C. McEldowney, *et al.*, Executors,
Estate of Henry C. Frick,
1924 Frick Building,
Pittsburgh, Pennsylvania.

Sirs:

The reaudit of your income tax returns for the period December 3, to December 31, 1919, and the calendar years 1920 to 1923, inclusive, filed for the Estate of Henry C. Frick, discloses an overassessment of $18,252.99 for 1919. The details of the various adjustments made are shown in the attached statement.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through

the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with the provisions of Section 284 of the Revenue Act of 1926.

A copy of this letter is being furnished your representative, Mr. John G. Buchanan, in accordance with the authority conferred upon him.

Respectfully,

Assistant to the Commissioner.

Enclosure:
Statement
HEO/
LQC-2

STATEMENT

IT:FAR
PL

In re: H. C. McEldowney, et al., Executors,
Estate of Henry C. Frick,
1924 Frick Building,
Pittsburgh, Pennsylvania.

Period	*Deficiency in Tax*	*Overassessment*
December 3 to December 31, 1919		$18,252.99 (Claim filed)
1920	None	
1921	None	
1922	None	
1923	None	

The reports of the Internal Revenue Agent in Charge, dated February 26, 1925, May 20, 1926, May 10 and 27, 1927, have been reviewed and approved with the following exceptions:

Period December 3 to 31, 1919

Annual depreciation allowances have been adjusted to conform with the values and rates agreed upon in conferences held with your representatives in the case of Henry C. Frick, deceased. The revised depreciation allowance therefore is $6,678.33, detailed schedule of which has been previously furnished you. In accordance with representations made at the conferences, expenses eliminated by the agent under Schedule 1(a) have beeen allowed as a proper deduction.

In accordance with the provisions of Income Tax Unit Ruling 2166, C. B. IV-1 and the principles promulgated in S. M. 3256, C. B. IV-1, the aggregate dividends received have been included in taxable income.

The distributive partnership interest from A. Overholt and Company and the West Overton Distilling Company, as shown by the agent, has been eliminated from taxable income, as it is held by this office that the effect of the decedent's death serves to capitalize his interests in the respective partnerships.

Profit on the sale of Bankers Trust Company rights has been increased from $12,341.95 as shown in the supplemental report to $17,605.69. The agent's computations were made under the provisions of Article 39, Regulations 69. By Treasury Decision 4018, approved June 2, 1927, it is held

that the provisions of the pertinent Article will not be retroactively applied and will only govern sales taking place on or after January 1, 1925. The revised computation was explained to your representative at conference held May 13, 1927.

The corrected income is as follows:

Net income as shown by agent in original report		$38,213.53
Add:		
Profit on sale of rights	$ 17,605.68	
Additional dividends	160,109.50	
Decreased depreciation	1,291.48	
Elimination partnership loss	10,424.17	
	$189,430.83	
Less:		
Increased expenses	2,552.34	186,878.49
Corrected income		$225,092.02
Personal exemption	$ 1,000.00	
Dividends	188,853.50	189,853.50
Income subject to normal tax		$ 35,238.52
Normal tax	$ 2,659.08	
Surtax	92,565.21	
	$ 95,224.29	
Previously assessed	113,477.28	
Overassessment	$ 18,252.99	

1920-1921-1922-1923

At the conference held on April 27, 1927, your representatives requested a supplemental investigation in view of the recently promulgated Treasury Decisions 4010, 4011 and 4012. These decisions affect the determination of gain or loss on sales of decedent's property by the executors of estates in process of administration. The agent's additional reports have been received, the audit of which indicates that there is no taxable income for the calendar years 1920 to 1923, inclusive.

This communication supersedes office letter dated December 6, 1926.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with the provisions of Section 284 of the Revenue Act of 1926.

Q. I show you paper marked Plaintiffs' Exhibit No. 6, and ask you if that is the letter you just referred to?

A. It is; it is a copy sent to me as attorney of the letter sent to the executors.

Q. It came from the Department in Washington, did it?

A. It did.

Q. Did you communicate the contents of that letter to Mr. Seifert, the attorney for the other partners, A. W. and R. B. Mellon?

A. I communicated the contents of the letter to Mr. Seifert, so far as they had to do with the A. Overholt & Company and the West Overton Distilling Company.

Q. That is what I meant. And did you reach any understanding or agreement with respect to settlement on that basis?

Mr. Eustace:

That is objected to, as incompetent, irrelevant and immaterial, and not binding on the defendant.

Mr. Frazer:

This is preliminary to showing it was communicated to the representatives of the defendant prior to the settlement being made.

The Court:

I don't see very great force to it, but I have admitted all this other with respect to which I am in doubt. I will overrule the objection and note an exception, subject to subsequent ruling.

Q. (Question read).

A. Before or in the course of the hearings on the question of A. Overholt & Company income in Washing, in the case of the Estate of H. C. Frick, I conferred with Mr. Seifert as attorney for the other partners of that firm, and I was authorized by Mr. Seifert to say that the ruling made in the case of the Estate of H. C. Frick could be made also in the cases of the other two partners, which had not yet been reached in audit, as I understood. I so advised the conferees in Washington.

Mr. Eustace:

I move to strike the answer, as not responsive, and incompetent, irrelevant and immaterial.

The Court:

I think it is responsive. The motion is denied, and an exception noted.

Q. What was the ruling made with respect to this income?

A. For the period December 3 to 31, 1919, the ruling was: "The distributive partnership interest from A. Overholt & Company and the West Overton Distilling Company as shown by the agent has been eliminated from taxable income, as it is held by this office that the effect of the decedent's death serves to capitalize his interests in the respective partnerships." On the same day a letter was received covering the years 1924 and 1925, in the case of the Estate of H. C. Frick, and rulings were made on the subject of A. Overholt & Company and West Overton Distilling Company income in that letter.

Q. What were those rulings?

A. For the year 1924 the ruling was this: "The deduction of $15,846.49 distributive loss through partnerships of A. Overholt & Company and the West Overton Distilling Company has been eliminated to agree with similar action taken in prior years 1919 to 1923, inclusive." There was no discussion of the matter in connection with the taxes for the years 1920 to 1923, because there was no tax liability of the Estate of H. C. Frick in those years.

Q. What was the ruling in 1925—as to 1925 income?

Mr. Eustace:

We desire the same objection.

The Court:

Objection overruled for the present, and exception.

A. Shall I read into the record the ruling?

Q. Yes.

A. The ruling for 1925 is somewhat lengthy. It begins this way: "The following adjustments have been made in net capital gain as set up in Exhibit 'B' revised"—Perhaps I can show it to the attorney for the United States and have it copied into the record instead of reading all these figures.

Mr. Eustace:

Well, I think probably we had better wait until we cross examine.

Q. Well, can you give us the effect of that ruling?

Mr. Eustace:

That is objected to, as calling for a conclusion of the witness.

The Court:

Objection overruled, and exception noted.

A. The amount received by the estate in 1925—

Q. Just a moment. I mean the basis for the ruling; can you give that?

A. That is what I am trying to give. The amount received by the estate in liquidation in 1925 was shown,

and the cost of the decedent's interest based on an amended balance sheet of December 2, 1919, and giving effect to adjustments made in the audit of the 1918 return, was shown; a comparison of those two figures showed a profit. A similar comparison in the case of the West Overton Distilling Company showed a profit; and these profits were shown in net capital gain. I would like to make this explanation, however: that this was not the final letter received by the Estate of H. C. Frick, which did not come until February of 1928. On account of other adjustments in tax liability, the taxpayer did not elect to take advantage of capital gain rates, because there would be no advantage in doing so, and therefore the ultimate tax was not at capital gain rates.

Q. The letter you just quoted, however, was based on the ruling that it was a capital gain?

A. It was; and that ruling was not changed.

Q. And all the income from the time of Mr. Frick's death until 1925 was included in the 1925 capital gain figure, was it?

A. Yes; the income of certain years and the loss of at least one year.

Q. Yes, the net income?

A. The net income.

Cross Examination:

By Mr. Eustace:

Q. Mr. Buchanan, I believe you stated that the letters from which you were making your statements

did not represent the final letters of the Commissioner of Internal Revenue?

A. That is correct; the final letter was dated February 16, 1928.

Q. And that involved a settlement, did it not, of the income tax liability of Henry C. Frick and the Frick Estate for a number of years?

A. The final letter covered the period from December 3, 1919, to the end of the year 1925.

Q. And included the year 1920?

A. It did.

Q. And as a matter of fact, there was no tax liability of the Estate of Henry C. Frick for the year 1920?

A. That is correct.

Q. So that it would not have made any difference so far as the manner and method in which the Commissioner treated the income of the two partnerships of A. Overholt & Company and the West Overton Distilling Company for the year 1920, as affecting the income tax liability for that year of the Frick Estate?

A. That is correct; it did not affect the liability for that particular year. May I correct that answer: It possibly did affect the liability for the year 1920, because the income from A. Overholt & Company was not included in the basis for taxation for that year. I believe, however, that other deductions would eliminate the tax for that year.

Mr. Eustace:

That is all. We move to strike all the testimony of this witness, for the reason it is incompetent, irrelevant and immaterial, hearsay, and not binding on the defendant, and not proper rebuttal testimony, not tending to prove or disprove any issue involved in this case.

The Court:

The motion is denied, and exception noted.

Thereupon plaintiffs rested in rebuttal and no further evidence was offered by plaintiffs or defendant.

Thereupon, counsel for defendant orally renewed defendant's previous motion for judgment, but with the inclusion of additional grounds, in each of said consolidated cases on each ground therein stated, and the same, after being so made, were duly filed in writing and made part of the record, and as so made and filed are in words and figures as follows:

Motion for Judgment on Behalf of the Defendant.

(Caption No. 6980 Law.)

Comes now the defendant herein, by Horatio S. Dumbauld, United States Attorney for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney for said District, his attorneys, and after the close of all the evidence and before submission of said case to the Court, and prior

to the announcement by the Court of its decision and the entry of final judgment, respectfully moves the Court for judgment in favor of the defendant and against the plaintiff herein, on the following grounds, to-wit:

1. Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

2. As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

3. As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

4. Under the provisions of Section 218 of the Revenue Act of 1918, A. W. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

5. The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

6. There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

7. There is no warrant in law for the plaintiff's contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until A. W. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

8. The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

9. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

10. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

11. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

12. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in controversy in this action were assessed and collected, was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organizations for the year 1920.

13. Plaintiff is estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against A. W. Mellon for the year 1920, was not lawfully assessed and legally collected.

14. If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy, was determined, assessed and collected, A. W. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the

year 1920 in an amount in excess of the amount of $202,502.22, collected by the defendant A. W. Mellon as a deficiency in tax and interest thereon for the year 1920.

15. In equity and good conscience the plaintiff ought not to recover of and from the defendant herein.

16. The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant from A. W. Mellon.

17. The pleadings and the evidence in this case, with every inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

18. Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

19. The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiff's Statement of Claim, at plaintiff's costs.

In the event the Court overrules defendant's foregoing motion for judgment, on any of the specific grounds therein set forth, defendant respectfully excepts and prays that he be allowed an exception or exceptions to such action and ruling of the Court; and defendant further excepts and prays that he be al-

lowed an exception or exceptions to the action and ruling of the Court in making and entering any findings of fact, and conclusions of law, or either thereof, requested by plaintiff.

Motion for Judgment on Behalf of the Defendant.

(Caption No. 6979 Law.)

Comes now the defendant herein, by Horatio S. Dumbauld, United States Attorney for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney for said District, his attorneys, and after the close of all the evidence and before submission of said case to the Court, and prior to the announcement by the Court of its decision and the entry of final judgment, respectfully moves the Court for judgment in favor of the defendant and against the plaintiffs herein, on the following grounds, to-wit:

1. Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

2. As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

3. As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to

file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

4. Under the provisions of Section 218 of the Revenue Act of 1918, R. B. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

5. The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

6. There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

7. There is no warrant in law for the plaintiffs' contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until R. B. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

8. The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any addition-

al amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

9. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overtion Distilling Company, or either of them, earned during 1920, was income from property held in trust.

10. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

11. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

12. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in controversy in this action were assessed and collected, was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect

any amounts as the income tax liabilities of said organization for the year 1920.

13. Plaintiffs are estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against R. B. Mellon for the year 1920, was not lawfully assessed and legally collected.

14. If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy was determined, assessed and collected, R. B. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $187,787.17, collected by the defendant from R. B. Mellon as a deficiency in tax and interest thereon for the year 1920.

15. In equity and good conscience the plaintiffs ought not to recover of and from the defendant herein.

16. The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant from R. B. Mellon.

17. The pleadings, and the evidence in this case with every inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

18. Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiffs and against the defendant.

19. The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiff's Statement of Claim, at plaintiff's costs.

In the event the Court overrules defendant's foregoing motion for judgment, on any of the specific grounds therein set forth; defendant respectfully excepts and prays that he be allowed an exception or exceptions to such action and ruling of the Court; and defendant further excepts and prays that he be allowed an exception or exceptions to the action and ruling of the Court in making and entering any findings of fact, and conclusions of law, or either thereof, requested by plaintiffs.

Thereupon, counsel for plaintiffs requested leave to file motions for judgment in favor of plaintiffs in each of said cases for the full amounts claimed.

The Court:

The motions of both the defendant and the plaintiffs may be filed.

Which said motions of plaintiffs, which were similar, are in words and figures as follows:

Motion for Judgment.

And Now, to wit, October 29, 1934, plaintiffs move (plaintiff moves, Law No. 6980), the Court to enter judgment in their (his) favor and against the defend-

ant for the full amount of their (his) claim upon the pleadings and all the evidence.

Thereupon, defendant, by his counsel, with leave of court first had and obtained, filed his written request for special findings of fact and conclusions of law in each of said cases in words and figures as follows:

Defendant's Motion for Special Findings of Fact and Conclusions of Law.

(Caption No. 6980 Law.)

Comes now the defendant in the above entitled cause by Horatio S. Dumbauld, United States Attorney for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney for said District, his attorneys, and respectfully moves the Court to make and enter the following specific findings of fact, and to declare and enter the following conclusions of law, to-wit:

FINDINGS OF FACT.

1. The praecipe for summons in this action was filed on March 23, 1932, and the Statement of Claim herein was filed on October 24, 1933, by plaintiff, A. W. Mellon, a resident of the City of Pittsburgh, Allegheny County, Pennsylvania.

2. The defendant, D. B. Heiner, was duly appointed United States Collector of Internal Revenue for the Twenty-Third Collection District of Pennsyl-

vania on or about the first day of August, 1921, and from and after said date until on or about the thirtieth day of June, 1933, was the duly appointed, qualified, and acting Collector of Internal Revenue for said Twenty-third Collection District of Pennsylvania and a resident of the western judicial district of Pennsylvania.

3. During the year 1920, plaintiff kept his books and records and filed his income tax return for said year on the cash receipts and disbursements method of accounting. On or about the fifteenth day of March, 1921, plaintiff filed with the then Collector of Internal Revenue for said collection district, his Federal income tax return for the calendar year 1920. The tax liability shown on said return was $919,777.86, which amount was duly assessed and paid.

4. On or about December 12, 1918, R. B. Mellon, A. W. Mellon, and Henry C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of A. Overholt & Co. and West Overton Distilling Company, each being registered under the Fictitious Names Act of Pennsylvania. True and correct copies of said partnership agreements are attached to the Statement of Claim as Exhibits "A" and "B" and are by reference made a part hereof. In and by said partnership agreements R. B. Mellon, A. W. Mellon, and Henry C. Frick had equal one-third interests in each of said partnerships.

5. On or about January 1, 1919, the property and assets of a corporation bearing the name of A. Overholt & Co. were transferred to the partnership of A. Overholt & Co. At or about the same time the property and assets of a corporation bearing the name of West Overton Distilling Company were transferred to the partnership of West Overton Distilling Company. Included in the properties so received by said partnerships were large amounts of spirituous liquors stored in bonded warehouses.

6. The business of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company consisted primarily of the storage, bottling and casing, and sale of spiritous liquors. The books and records in respect to the businesses and activities of said partnerships, and each of them, were kept by the accrual method of accounting.

7. Henry C. Frick died on or about December 2, 1919. Thereafter and throughout the year 1920 the business of each of the two partnerships of A. Overholt & Co. and West Overton Distilling Company was actively carried on and continued in exactly the same manner as prior to the death of Henry C. Frick. The net income earned by A. Overholt & Co. during the year 1920 in the ordinary course of business was $845,339.86, computed in the following manner:

Gross Income

Whiskey sales, not less than		$ 928,273.71
Less: January 1, 1920 whiskey inventory	$ 794,235.38	

Less: December 31, 1920 whiskey inventory	697,307.34	96,928.04
Gross profit on whiskey sales		831,345.67
Sales of empty barrels, not less than		6,609.31
Charges for bottling and casing, not less than		320,533.61
Storage charges, not less than		42,550.50
Other operating income not allocated		33,578.67
Interest received		3,480.73
Rents received		300.00
Total		$1,238,398.49
Deductions		
Salaries and wages	39,600.01	
Insurance	18,190.00	
Taxes	31,132.86	
Storage expense	23,446.60	
Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office	3,519.59	
Cases, bottles, corks, other supplies and misc.	166,749.49	
Loss on Liberty Bonds	5,328.75	393,058.63
Net income		$ 845,339.86

The net income earned by West Overton Distilling Company during the year 1920 in the ordinary course of business was $158,442.84, computed in the following manner:

Gross Income.

Sales less returns		$ 218,050.31
Less: Inventory December 31, 1919	$ 121,135.00	
Less: Inventory December 31, 1920	93,819.44	27,315.56
Total		$ 190,734.75

Deductions

Labor	8,188.92	
Taxes	2,236.44	
Depreciation	1,739.49	
Loss on Liberty Bonds	507.50	
Storage	1,211.40	
Insurance	5,528.16	
Other expenses—Bad debts, etc.	11,650.00	
Salesmen's commissions ...	1,230.00	
Total		32,291.91
Net income		$ 158,442.84

8. During the year 1920 the sum of $800,000 was distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick by A. Overholt & Co. In connection with such distributions said parties gave to A. Overholt & Co. non-interest bearing notes in the aggregate amount of $750,000. The amounts so distributed were not intended to be loans from A. Overholt & Co. to said parties. At the time said distributions were made, there was no intention that said parties would pay said notes, and the same were not in fact paid but were returned to the makers thereof in 1925 at the time the property and assets then owned by A. Overholt & Co. and West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick. Said distributions were in fact distributions of a part of the 1920 income of A. Overholt & Co. to said parties. R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick received actual possession of that part of the 1920 income of A. Overholt & Co. represented by said distributions.

9. During the period from December 2, 1919, to and including December 31, 1920, the assets of A. Overholt & Co. and West Overton Distilling Company, including cash, were kept separate and were not commingled with the assets or cash of R. B. Mellon or A. W. Mellon.

10. On or about March 15, 1921, plaintiff and his brother, R. B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-Third Col-

lection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Co. on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and reported that A. Overholt & Co. was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to plaintiff, his brother, R. B. Mellon, and the estate of Henry C. Frick.

11. The said return showed gross income of $169,649.13, computed in the following manner:

Sales of empty barrels		$ 6,609.31
Bottling and casing		320,563.61
Storage		42,550.50
Total		$369,693.42
Less: Labor	$ 12,859.41	
Revenue stamps	8,020.90	
Cases, bottles, corks, etc.	150,922.31	
Water and other expenses	10,757.98	
Storage, labor, and exp.	21,264.42	203,825.02
Balance		165,868.40
Interest		3,480.73
Rentals		300.00
Gross income reported		$169,649.13

Deductions of $19,268.15, together with a loss of $5,278.75 from the sale of capital assets or investments shown on said return, resulted in the return showing a net income to be accounted for by the parties interested in A. Overholt & Co. of $145,052.23. $48,350.74 of said amount was reported on the return as distributable and taxable to plaintiff; $48,350.74 of said amount was reported on the return as distributable and taxable to R. B. Mellon; and $48,350.75 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

12. Although the gross income reported on the return filed for A. Overholt & Co. did not include any amount for profit realized by A. Overholt & Co. on the sale of whiskey, a special schedule attached to said return disclosed that in the year 1920 A. Overholt & Co. realized a profit of $646,327.63 on the sale of whiskey. Such profit is computed in the following manner:

Gross sale price of whiskey ...		$928,273.71
Less: January 1, 1920 whiskey inventory	$595,676.53	
December 31, 1920 whiskey inventory	498,748.49	96,928.04
Gross profit on whiskey sales.		831,345.67
Less: Insurance	16,000.00	
Taxes	3,000.00	
Salesmen's salary and commission	11,726.00	
Storage	23,446.60	

United States taxes paid	9,857.70	
Distillery labor, expense and maintenance	46,791.27	
Salaries	14,302.03	
Bradford office expense .	1,809.80	
Office rent and miscellaneous	3,039.02	
Adv. and other expense .	55,047.46	
Claim adjustment	1.84	185,021.72
Net profit on whiskey sales ..		$646,327.63

13. Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Co. on the form prescribed for the making of returns by fiduciaries of a trust.

14. On or about March 15, 1921, plaintiff and his brother, R. B. Mellon, caused to be filed with the Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for West Overton Distilling Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. Plaintiff therein claimed and reported that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to plaintiff, his brother, R. B. Mellon, and the estate of Henry C. Frick.

15. Said return showed a gross income of $27,735.48, computed in the following manner:

Gross sales	$47,729.00	
Costs of goods sold	20,127.92	$27,601.08
Rents received		134.40
Gross income reported		$27,735.48

Deductions of $9,853.84 shown on said return resulted in the return showing a net income to be accounted for by the parties interested in West Overton Distilling Company of $17,881.64. $5,960.55 of said amount was reported on the return as distributable and taxable to plaintiff; $5,960.55 of said amount was reported on the return as distributable and taxable to R. B. Mellon; $5,960.54 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

16. Although a gross income of only $27,735.48 and a net income of only $17,881.64 was reported on the face of said return, balance sheets attached to said return disclose that during the year 1920 the net assets of West Overton Distilling Company were increased, not by $17,881.64, but by $156,539.02, or in the amount of $138,657.38 in excess of the net income shown on the face of the return.

17. Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of

the income of West Overton Distilling Company on the form prescribed for the making of returns by fiduciaries of a trust.

18. On his Federal income tax return for 1920, plaintiff included $48,350.74 as income from the partnership of A. Overholt & Co., and included the sum of $5,960.55 as income from the partnership of West Overton Distilling Company.

19. In the year 1921, the Commissioner of Internal Revenue caused an examination to be made by an Internal Revenue Agent of the partnership returns filed in the name of and for A. Overholt & Co. and West Overton Distilling Company for the year 1920, and the income tax return filed by plaintiff for the year 1920. On December 20, 1922, the Commissioner mailed to plaintiff a preliminary letter showing a deficiency for 1920 of $180,106.27. On December 16, 1926, the Commissioner mailed to plaintiff a preliminary letter showing a deficiency for the year 1920 of $195,229.70. On February 21, 1927, the Commissioner mailed to plaintiff a final deficiency letter showing a deficiency in income tax for the year 1920 of $190,419.70. On March 19, 1927, said deficiency of $190,419.70, together with interest in the sum of $12,082.52, was assessed against plaintiff. Thereafter, on or about March 23, 1927, the defendant notified plaintiff of said assessment. On or about April 2, 1927, plaintiff paid to defendant said sums of $190,419.70 and $12,082.52.

20. In examining the partnership return filed in the names of and for A. Overholt & Co. and West Overton Distilling Company, the Internal Revenue Agent and the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Co. and the 1920 income of West Overton Distilling Company, and merely changed the amount of the incomes so reported. The Commissioner increased plaintiff's share of the net income of A. Overholt & Co. for the year 1920 from $48,350.74 to $281,779.95, by determining that the net income earned by A. Overholt & Co. during the year 1920 was $845,339.86 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $281,779.95 as plaintiff's share thereof. The Commissioner increased plaintiff's share of the net income of West Overton Distilling Company for the year 1920 from $5,960.55 to $52,814.28, by determining that the net income earned by West Overton Distilling Company during the year 1920 was $158,442.84 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $52,814.28 as plaintiff's share thereof.

21. On or about January 20, 1923, plaintiff filed with the Commissioner a protest against the action set out in the Commissioner's preliminary letter of December 20, 1922. On January 31, 1927, plaintiff filed with the Commissioner a protest against the action set forth in the Commissioner's preliminary letter of December 16, 1926. In neither of said protests, nor at any other time, nor in any other manner, prior to

the time of filing his claim for refund hereinafter mentioned, did plaintiff assert and claim that the A. Overholt & Co. or West Overton Distilling Company should be treated in any other manner than as partnerships.

22. On or about March 19, 1929, plaintiff filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose a claim for refund for the year 1920 of $194,160.75. In said refund claim the said plaintiff assigned the following reasons for the allowance thereof:

> In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Distilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $281,779.95 and $52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined ~~that~~ these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners' individual incomes for those years. Ac-

cordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.29, erroneously included by the Commissioner in income for that year.

23. By letter dated April 16, 1932, the Commissioner of Internal Revenue advised plaintiff that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of A. Overholt & Co. and the operating income of West Overton Distilling Company were reportable in the year in which the income was realized. Said letter further advised plaintiff that he would be afforded a hearing before the Income Tax Unit at Washington upon written request therefor. Plaintiff, through counsel, was accorded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter by letter dated February 27, 1934, addressed to A. W. Mellon, the plaintiff was advised "that your proportionate share of the operating profits" of A. Overholt & Co. and West Overton Distilling Company "was properly reportable on your 1920 return", and that "accordingly, the claim will be disallowed." Plaintiff's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was made by letter dated April 6, 1934, addressed to A. W. Mellon.

24. If the income of A. Overholt & Co. for the calendar year 1920 had been treated and reported by

plaintiff and his brother, R. B. Mellon, or had been treated by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $551,914.70, computed as follows:

Net income (as set out in Paragraph 7 hereof)		$845,339.86
Less exemption		1,000.00
Net income subject to normal tax		$844,339.86
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $840,339.86	67,227.19	
Surtax on $845,339.86	484,527.51	
		$551,914.70

If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by plaintiff and R. B. Mellon, or had been treated by the Commissioner of Internal Revenue as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $66,673.42, computed as follows:

Net income (as set out in Paragraph 7 hereof)	$158,442.84
Less exemption	1,000.00
Net income subject to normal tax	$157,442.84

Normal tax at 4% on $4,000 ..	$ 160.00
Normal tax at 8% on $153,442.84	12,275.43
Surtax on $158,442.84	54,237.99
Total tax liability	$66,673.42

No such action was taken by plaintiff or R. B. Mellon, and no income taxes for the year 1920 have been levied or paid on the income earned by A. Overholt & Co. in the year 1920 or on the income earned by West Overton Distilling Company in the year 1920 except the amounts involved in this proceeding and in the related action brought by R. B. Mellon.

25. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Co. were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $551,914.70 could have been collected. The amount of money together with the value of the property so received by plaintiff in distribution was equal or to in excess of the amount of $551,914.70.

26. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $66,-

673.42 could have been collected. The amount of money together with the value of the property so received by plaintiff in distribution was equal to or in excess of the amount of $66,673.42.

27. The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

28. The partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

29. The partnerships of A. Overholt & Co. and West Overton Distilling Company, and each of them, were in existence throughout the year 1920.

30. A. Overholt & Co. and West Overton Distilling Company were required to and properly filed partnership returns of income on Form 1065 for the year 1920.

31. A. W. Mellon's distributive share of the net income of the partnership of A. Overholt & Co. for the year 1920 was $281,779.95.

32. A. W. Mellon's distributive share of the net income of the partnership of West Overton Distilling Company for the year 1920 was $52,814.28.

33. In determining the deficiency assessed and collected from A. W. Mellon, the Commissioner of Internal Revenue properly included in A. W. Mellon's taxable income for the year 1920 the sum of $281,779.95 as his distributive share of the net income of A. Overholt & Co. for the year 1920.

34. In determining the deficiency assessed and collected from A. W. Mellon, the Commissioner of Internal Revenue properly included in A. W. Mellon's taxable income in the year 1920 the sum of $52,814.28 as his distributive share of the net income of West Overton Distilling Company for the year 1920.

35. The defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on A. W. Mellon's original position and representation in respect of the manner and method of reporting the income earned by A. Overholt & Co. in the year 1920 and the income earned by West Overton Distilling Company in the year 1920.

36. If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any amounts as the income tax liabilities of said organizations for the year 1920.

37. Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income from property held in trust.

38. Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income of a taxable trust or trusts.

39. Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

40. Plaintiff is estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

41. Plaintiff is estopped to assert and claim that the amounts in controversy in this action were not properly assessed by the Commissioner of Internal Revenue and properly collected by the defendant.

42. Even though the income, on which the taxes in controversy were asserted, assessed and collected, was income of taxable trusts, as a result of the distribution of all the properties and assets of A. Overholt & Co. and West Overton Distilling Company and the receipt by A. W. Mellon in such distribution of money

and property amounting to in excess of $600,000, at the time the deficiency involved in this proceeding was determined and assessed by the Commissioner of Internal Revenue, and collected by the defendant, A. W. Mellon was indebted to the United States as a transferee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount collected by the defendant from A. W. Mellon, as hereinbefore set forth.

43. Defendant is not indebted to A. W. Mellon in any sum whatsoever.

Upon the foregoing special findings of fact, which are hereby made a part of the judgment herein, the Court finds and enters the following:

CONCLUSIONS OF LAW.

1. Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

2. As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

3. As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

4. Under the provisions of Section 218 of the Revenue Act of 1918, A. W. Mellon was taxable upon his distributive share of the net income of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

5. The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

6. There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

7. There is no warrant in law for the plaintiff's contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until A. W. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

8. The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

9. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

10. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

11. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to A. W. Mellon, if such a trust or trusts existed.

12. Plaintiff is estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in controversy in this action were assessed and collected, was not taxable to A. W. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organizations for the year 1920.

13. Plaintiff is estopped to assert and claim that the deficiency asserted, determined and assessed by

the Commissioner of Internal Revenue against A. W. Mellon for the year 1920, was not lawfully assessed and legally collected.

14. If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy, was determined, assessed and collected, A. W. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $202,502.22, collected by the defendant from A. W. Mellon as a deficiency in tax and the interest thereon for the year 1920.

15. In equity and good conscience the plaintiff ought not to recover of and from the defendant herein.

16. The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant from A. W. Mellon.

17. The pleadings and the evidence in this case, with every inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

18. Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiff and against the defendant.

19. The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiff's Statement of Claim, at plaintiff's costs.

In the event the Court fails or refuses to make, adopt, or enter the foregoing findings of fact and conclusions of law, or any thereof, defendant respectfully excepts and prays that he be allowed an exception or exceptions to such action and ruling of the Court; and defendant further excepts and prays that he be allowed an exception to any ruling and action of the Court in making and entering any other findings of fact and conclusions of law, or either thereof.

Defendant's Motion for Special Findings of Fact and Conclusions of Law.

(Caption No. 6979 Law.)

Comes now the defendant in the above entitled cause by Horatio S. Dumbauld, United States Attorney for the Western District of Pennsylvania, and D. Lloyd Claycomb, Assistant United States Attorney for said District, his attorneys, and respectfully moves the Court to make and enter the following specific findings of fact, and to declare and enter the following conclusions of law, to-wit:

FINDINGS OF FACT.

1. The praecipe for summons in this action was filed on March 23, 1932, and the Statement of Claim

herein was filed on October 24, 1933, by R. B. Mellon, a resident of the City of Pittsburgh Allegheny County, Pennsylvania. The said R. B. Mellon died testate on or about December 1, 1933, and the duly qualified executors and executrices of his estate are Jennie King Mellon, Richard King Mellon and Sarah Mellon Scaife, all residents of Pittsburgh, Pennsylvania, and the Union Trust Company of Pittsburgh, a corporation doing business in Pittsburgh, Pennsylvania, all of whom by order of Court have been substituted as parties plaintiff herein.

2. The defendant, D. B. Heiner, was duly appointed United States Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania on or about the first day of August, 1921, and from and after said date until on or about the thirtieth day of June, 1933, was the duly appointed, qualified, and acting Collector of Internal Revenue for said Twenty-third Collection District of Pennsylvania and a resident of the western judicial district of Pennsylvania.

3. During the year 1920, R. B. Mellon kept his books and records and filed his income tax return for said year on the cash receipts and disbursements method of accounting. On or about the fifteenth day of March, 1921, R. B. Mellon filed with the then Collector of Internal Revenue for said collection district, his Federal income tax return for the calendar year 1920. The tax liability shown on said return was $406,673.28, which amount was duly assessed and paid.

4. On or about December 12, 1918, R. B. Mellon, A. W. Mellon, and Henry C. Frick entered into two separate written partnership agreements to trade and do business under the respective names of A. Overholt & Co. and West Overton Distilling Company, each being registered under the Fictitious Names Act of Pennsylvania; true and correct copies of said partnership agreements are attached to the Statement of Claim as Exhibits "A" and "B" and are by reference made a part hereof. In and by said partnership agreements R. B. Mellon, A. W. Mellon, and Henry C. Frick had equal one-third interests in each of said partnerships.

5. On or about January 1, 1919, the property and assets of a corporation bearing the name of A. Overholt & Co. were transferred to the partnership of A. Overholt & Co. At or about the same time the property and assets of a corporation bearing the name of West Overton Distilling Company were transferred to the partnership of West Overton Distilling Company. Included in the properties so received by said partnerships were large amounts of spiritous liquors stored in bonded warehouses.

6. The business of each of the partnerships of A. Overholt & Co. and West Overton Distilling Company consisted primarily of the storage, bottling and casing, and sale of spiritous liquors. The books and records in respect to the businesses and activities of said partnerships, and each of them, were kept by the accrual method of accounting.

7. Henry C. Frick died on or about December 2, 1919. Thereafter and throughout the year 1920 the business of each of the two partnerships of A. Overholt & Co. and West Overton Distilling Company was actively carried on and continued in exactly the same manner as prior to the death of Henry C. Frick. The net income earned by A. Overholt & Co. during the year 1920 in the ordinary course of business was $854,339.86, computed in the following manner:

Gross Income

Whiskey sales, not less than		$928,273.71
Less: January 1, 1920 whiskey inventory	$794,235.38	
December 31, 1920 whiskey inventory	697,307.34	96,928.04
Gross profit on whiskey sales		831,345.67
Sales of empty barrels, not less than		6,609.31
Charges for bottling and casing, not less than		320,533.61
Storage charges, not less than		42,550.50
Other operating income not allocated		33,578.67
Interest received		3,480.73
Rents received		300.00
Total		$1,238,398.49

Deductions		
Salaries and wages	$ 39,600.01	
Insurance	18,190.00	
Taxes	31,132.86	
Storage expense	23,446.60	
Bottling expense	22,867.98	
Distilling expense	46,311.27	
General expense	35,912.08	
Expenses of Bradford office	3,519.59	
Cases, bottles, corks, other supplies and mise	166,749.49	
Loss on Liberty Bonds	5,328.75	
Total		393,058.63
Net income		$845,339.86

The net income earned by West Overton Distilling Company during the year 1920 in the ordinary course of business was $158,442.84, computed in the following manner:

Gross Income			
Sales less returns			$218,050.31
Less: Inventory December 31, 1919	$121,135.00		
Inventory December 31, 1920	93,819.44		27,315.56
Total			190,734.75

Deductions		
Labor	8,188.92	
Taxes	2,236.44	
Depreciation	1,739.49	
Loss on Liberty Bonds	507.50	
Storage	1,211.40	
Insurance	5,528.16	
Other expenses—Bad debts, etc.	11,650.00	
Salesmen's commissions	1,230.00	
Total		32,291.91
Net income		$158,442.84

8. During the year 1920 the sum of $800,000 was distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick by A. Overholt & Co. In connection with such distributions said parties gave to A. Overholt & Co. non-interest bearing notes in the aggregate amount of $750,000. The amounts so distributed were not intended to be loans from A. Overholt & Co. to said parties. At the time said distributions were made, there was no intention that said parties would pay said notes, and the same were not in fact paid but were returned to the makers thereof in 1925 at the time the property and assets then owned by A. Overholt & Co. and West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick. Said distributions were in fact distributions of a part of the 1920 income of A.

Overholt & Co. to said parties. R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick received actual possession of that part of the 1920 income of A. Overholt & Co. represented by said distributions.

9. During the period from December 2, 1919, to and including December 31, 1920, the assets of A. Overholt & Co. and West Overton Distilling Company, including cash, were kept separate and were not commingled with the assets or cash of R. B. Mellon or A. W. Mellon.

10. On or about March 15, 1921, R. B. Mellon executed and caused to be filed with the Collector of Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for A. Overholt & Co. on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and reported that A. Overholt & Co. was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to R. B. Mellon, his brother, A. W. Mellon, and the estate of Henry C. Frick.

11. The said return showed gross income of $169,649.13, computed in the following manner:

Sales of empty barrels		$ 6,609.31
Bottling and casing		320,563.61
Storage		42,550.50
Total		$369,693.42
Less: Labor	$12,859.41	

Revenue stamps	8,020.90	
Cases, bottles, corks, etc. ..	150,922.31	
Water and other expenses.	10,757.98	
Storage, labor, and exp. ..	21,264.42	203,825.02
Balance		$165,868.40
Interest		3,480.73
Rentals		300.00
Gross income reported		$169,649.13

Deductions of $19,268.15, together with a loss of $5,278.75 from the sale of capital assets or investments shown on said return, resulted in the return showing a net income to be accounted for by the parties interested in A. Overholt & Co. of $145,052.23. $48,350.74 of said amount was reported on the return as distributable and taxable to R. B. Mellon; $48,350.74 of said amount was reported on the return as distributable and taxable to A. W. Mellon; and $48,350.75 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

12. Although the gross income reported on the return filed for A. Overholt & Co. did not include any amount for profit realized by A. Overholt & Co. on the sale of whiskey, a special schedule attached to said return disclosed that in the year 1920 A. Overholt & Co. realized a profit of $646,327.63 on the sale of whiskey. Such profit is computed in the following manner:

Gross sale price of whiskey			$928,273.71
Less: January 1, 1920 whiskey inventory	$595,676.53		
December 31, 1920 whiskey inventory	498,748.49		96,928.04
Gross profit on whiskey sales ...			831,345.67
Less: Insurance		16,000.00	
Taxes		3,000.00	
Salesmen's salary & commission		11,726.00	
Storage		23,446.60	
United States taxes paid.		9,857.70	
Distillery labor, expense and maintenance		46,791.27	
Salaries		14,302.03	
Bradford office expense ..		1,809.80	
Office rent and miscellaneous		3,039.02	
Adv. and other expense ..		55,047.46	
Claim adjustment		1.84	185,021.72
Net profit on whiskey sales			$646,327.63

13. Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or cause to be filed an income tax return for the year 1920, covering any portion of the income of A. Overholt & Co. on the form prescribed for the making of returns by fiduciaries of a trust.

14. On or about March 15, 1921, R. B. Mellon executed and caused to be filed with the Collector of

Internal Revenue for the Twenty-Third Collection District of Pennsylvania, a partnership return of income for the calendar year 1920 in the name of and for West Overton Distilling Company on official form 1065, the form provided by the Commissioner of Internal Revenue for the making of partnership returns of income. R. B. Mellon therein claimed and reported that West Overton Distilling Company was a partnership and that the income thereof for the year 1920 was distributable and taxable, one-third each, to R. B. Mellon, his brother, A. W. Mellon, and the estate of Henry C. Frick.

15. Said return showed a gross income of $27,735.48, computed in the following manner:

Gross sales	$47,729.00	
Cost of goods sold	20,127.92	$27,601.08
Rents received		134.40
Gross income reported		$27,735.48

Deductions of $9,853.84 shown on said return resulted in the return showing a net income to be accounted for by the parties interested in West Overton Distilling Company of $17,881.64. $5,960.55 of said amount was reported on the return as distributable and taxable to R. B. Mellon; $5,960.55 of said amount was reported on the return as distributable and taxable to A. W. Mellon; $5,960.54 of said amount was reported on the return as distributable and taxable to the estate of Henry C. Frick.

16. Although a gross income of only $27,735.48 and a net income of only $17,881.64 was reported on the face of said return, balance sheets attached to said return disclose that during the year 1920 the net assets of West Overton Distilling Company were increased, not by $17,881.64, but by $156,539.02, or in the amount of $138,657.38 in excess of the net income shown on the face of the return.

17. Neither R. B. Mellon, A. W. Mellon, nor both acting jointly, filed, or caused to be filed an income tax return for the year 1920, covering any portion of the income of West Overton Distilling Company on the form prescribed for the making of returns by fiduciaries of a trust.

18. On his Federal income tax return for 1920 R. B. Mellon included $48,350.74 as income from the partnership of A. Overholt & Co., and included the sum of $5,960.55 as income from the partnership of West Overton Distilling Company.

19. In the year 1921, the Commissioner of Internal Revenue caused an examination to be made by an Internal Revenue Agent of the partnership returns filed in the name of and for A. Overholt & Co. and West Overton Distilling Company for the year 1920, and the income tax return filed by R. B. Mellon for the year 1920. On December 20, 1922, the Commissioner mailed to R. B. Mellon a preliminary letter showing a deficiency for 1920 of $174,422.45. On December 16. 1926, the Commissioner mailed to R. B. Mellon a pre-

liminary letter showing a deficiency for the year 1920 of $181,298.64. On February 21, 1927, the Commissioner mailed to R. B. Mellon a final deficiency letter showing a deficiency in income tax for the year 1920 of $175,259.70. On May 5, 1927, said deficiency of $175,259.70, together with interest in the sum of $12,527.47, was assessed against R. B. Mellon. Thereafter, on or about May 10, 1927, the defendant notified R. B. Mellon of said assessment. On or about May 19, 1927, R. B. Mellon paid to defendant said sums of $175,259.70 and $12,527.47.

20. In examining the partnership return filed in the names of and for A. Overholt & Co. and West Overton Distilling Company, the Internal Revenue Agent and the Commissioner accepted the manner and method of reporting the 1920 income of A. Overholt & Co. and the 1920 income of West Overton Distilling Company, and merely changed the amount of the incomes so reported. The Commissioner increased R. B. Mellon's share of the net income of A. Overholt & Co. for the year 1920 from $48,350.74 to $281,779.95, by determining that the net income earned by A. Overholt & Co. during the year 1920 was $845,339.86 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $281,779.95 as R. B. Mellon's share thereof. The Commissioner increased R. B. Mellon's share of the net income of West Overton Distilling Company for the year 1920 from $5,960.55 to $52,814.28, by determining that the net income earned by West Over-

ton Distilling Company during the year 1920 was $158,442.84 (as set out in Paragraph 7 hereof), and taking one-third of said amount, or $52,814.28 as R. B. Mellon's share thereof.

21. On or about January 19, 1923, R. B. Mellon filed with the Commissioner a protest against the action set out in the Commissioner's preliminary letter of December 20, 1922. On January 31, 1927, R. B. Mellon filed with the Commissioner a protest against the action set forth in the Commissioner's preliminary letter of December 16, 1926. In neither of said protests, nor at any other time, nor in any other manner, prior to the time of filing his claim for refund hereinafter mentioned, did R. B. Mellon assert and claim that the A. Overholt & Co. or West Overton Distilling Company should be treated in any other manner than as partnerships.

22. On or about March 19, 1929, R. B. Mellon filed with the defendant on the form prescribed by the Commissioner of Internal Revenue for that purpose a claim for refund for the year 1920 of $187,787.17, to-wit, the aforesaid sum of $175,259.70 additional tax and $12,527.47 interest. In said refund claim the said R. B. Mellon assigned the following reasons for the allowance thereof:

> In my tax return for 1920 there was included in my income the amounts of $48,350.74 and $5,960.55 as operating profits of the partnerships of A. Overholt & Company and West Overton Dis-

tilling Co., respectively. The Commissioner of Internal Revenue increased the income reported from these partnerships to $281,779.95 and $52,814.28, respectively, and assessed and collected additional taxes thereon. Mr. H. C. Frick, one of the partners, died in 1919. In 1925 the remaining assets of these partnerships were sold and distribution made. The Commissioner of Internal Revenue has determined that these businesses were in liquidation from the death of Mr. Frick on Dec. 3, 1919 and that the remaining partners and the Estate are taxable in 1925 when final liquidation was made and that no profit or loss for any year from 1919 to 1924 resulting from said liquidation should be added to or subtracted from the partners individual incomes for these years. Accordingly the income of the taxpayer for the year 1920 should be reduced by the amounts of $281,779.95 and $52,814.28, erroneously included by the Commissioner in income for that year.

23. By letter dated April 16, 1932, the Commissioner of Internal Revenue advised R. B. Mellon that his claim for refund for the year 1920 had been examined and would be rejected on the ground that the operating income of A. Overholt & Co. and the operating income of West Overton Distilling Company were reportable in the year in which the income was realized. Said letter further advised R. B. Mellon that he would be afforded a hearing before the Income Tax Unit at Washington upon written request therefor. R.

B. Mellon, through counsel, was accorded a hearing on or about October 12, 1932, and submitted a brief dated October 11, 1932. Thereafter by letter dated February 27, 1934, addressed to the Estate of R. B. Mellon, the plaintiffs were advised "that Mr. Mellon's proportionate share of the operating profits" of A. Overholt & Co. and West Overton Distilling Company "was properly reportable in his 1920 return", and that "accordingly, the claim will be disallowed." R. B. Mellon's refund claim for the year 1920 was disallowed by the Commissioner of Internal Revenue on a schedule dated April 6, 1934, and official notification of such disallowance was made by letter dated April 6, 1934, addressed to the Estate of R. B. Mellon.

24. If the income of A. Overholt & Co. for the calendar year 1920 had been treated and reported by R. B. Mellon and A. W. Mellon, or had been treated by the Commissioner of Internal Revenue, as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $551,914.70, computed as follows:

Net Income (as set out in Paragraph 7 hereof)	$845,339.86
Less exemption	1,000.00
Net income subject to normal tax	$844,339.86
Normal tax at 4% on $4,000	$ 160.00

Normal tax at 8% on $840,339.86	67,227.19
Surtax on $845,339.86 ...	484,527.51
Total tax liability	$551,914.70

If the income of West Overton Distilling Company for the calendar year 1920 had been treated and reported by R. B. Mellon and A. W. Mellon, or had been treated by the Commissioner of Internal Revenue as the income of a taxable trust, the correct tax liability, exclusive of interest as provided by law, of said trust, would have been $66,673.42, computed as follows:

Net income (as set out in Paragraph 7 hereof)		$158,442.84
Less exemption		1,000.00
Net income subject to normal tax		$157,442.84
Normal tax at 4% on $4,000	$ 160.00	
Normal tax at 8% on $153,442.84	12,275.43	
Surtax on $158,442.84 ...	54,237.99	
Total tax liability		$66,673.42

No such action was taken by R. B. Mellon or A. W. Mellon, and no income taxes for the year 1920 have been levied or paid on the income earned by A. Overholt & Co. in the year 1920 or on the income earned by

West Overton Distilling Company in the year 1920 except the amounts involved in this proceeding and in the related action brought by A. W. Mellon.

25. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of A. Overholt & Co. were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $551,914.70 could have been collected. The amount of money together with the value of the property so received by R. B. Mellon in distribution was equal to or in excess of the amount of $551,914.70.

26. On or prior to December 31, 1925, all of the monies, properties and assets of whatever nature of West Overton Distilling Company were distributed to R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick, leaving said organizations with no assets or property out of which the aforesaid amount of $66,673.42 could have been collected. The amount of money together with the value of the property so received by R. B. Mellon in distribution was equal to or in excess of the amount of $66,673.42.

27. The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the Estate of Henry C. Frick any additional amounts as income taxes on the income for the year

1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

28. The partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

29. The partnerships of A. Overholt & Co. and West Overton Distilling Company, and each of them, were in existence throughout the year 1920.

30. A. Overholt & Co. and West Overton Distilling Company were required to and properly filed partnership returns of income on Form 1065 for the year 1920.

31. R. B. Mellon's distributive share of the net income of the partnership of A. Overholt & Co. for the year 1920 was $281,779.95.

32. R. B. Mellon's distributive share of the net income of the partnership of West Overton Distilling Company for the year 1920 was $52,814.28.

33. In determining the deficiency assessed and collected from R. B. Mellon, the Commissioner of Internal Revenue properly included in R. B. Mellon's taxable income for the year 1920 the sum of $281,779.95 as his distributive share of the net income of A. Overholt & Co. for the year 1920.

34. In determining the deficiency assessed and collected from R. B. Mellon, the Commissioner of Internal Revenue properly included in R. B. Mellon's

taxable income in the year 1920 the sum of $52,814.28 as his distributive share of the net income of West Overton Distilling Company for the year 1920.

35. The defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on R. B. Mellon's original position and representation in respect of the manner and method of reporting the income earned by A. Overholt & Co. in the year 1920 and the income earned by West Overton Distilling Company in the year 1920.

36. If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any amounts as the income tax liabilities of said organizations for the year 1920.

37. Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income from property held in trust.

38. Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was income of a taxable trust or trusts.

39. Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected

was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

40. Plaintiffs are estopped to assert and claim that any portion of the income on which the taxes in controversy in this action were assessed and collected was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

41. Plaintiffs are estopped to assert and claim that the amounts in controversy in this action were not properly assessed by the Commissioner of Internal Revenue and properly collected by the defendant.

42. Even though the income on which the taxes in controversy were asserted, assessed and collected was income of taxable trusts, as a result of the distribution of all the properties and assets of A. Overholt & Co. and West Overton Distilling Company and the receipt by R. B. Mellon in such distribution of money and property amounting to in excess of $600,000, at the time the deficiency involved in this proceeding was determined and assessed by the Commissioner of Internal Revenue, and collected by the defendant, R. B. Mellon was indebted to the United States as a transferee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income

thereof for the year 1920 in an amount in excess of the amount collected by the defendant from R. B. Mellon as hereinbefore set forth.

43. Defendant is not indebted to R. B. Mellon, or any or all of the plaintiffs, or either of them, in any sum whatsoever.

Upon the foregoing special findings of fact, which are hereby made a part of the judgment herein, the Court finds and enters the following:

CONCLUSIONS OF LAW.

1. Under and pursuant to the provisions of Section 30 of the Pennsylvania Partnership Act, March 26, 1915, P. L. 18 (59 P. S. 92), the partnerships of A. Overholt & Co. and West Overton Distilling Company were not terminated by the death of Henry C. Frick.

2. As a matter of law, the partnerships of A. Overholt & Co. and West Overton Distilling Company continued in existence throughout the year 1920.

3. As a matter of law, A. Overholt & Co. and West Overton Distilling Company were required to file partnership returns of income for the year 1920, in accordance with the provisions of Section 224 of the Revenue Act of 1918.

4. Under the provisions of Section 218 of the Revenue Act of 1918, R. B. Mellon was taxable upon his distributive share of the net income of each of the

partnerships of A. Overholt & Co. and West Overton Distilling Company for the year 1920.

5. The income of a partnership in process of liquidation is taxable for Federal income tax purposes to the individual members thereof in the respective years in which realized, earned, and received by the partnership.

6. There is no warrant in law for postponing the taxation of a partnership in process of liquidation to the year in which the winding up of the affairs of the partnership is completed.

7. There is no warrant in law for the plaintiffs' contention that the income of A. Overholt & Co. and West Overton Distilling Company was not taxable until R. B. Mellon had received payments exceeding the cost value of his interest in the partnerships as of December 2, 1919.

8. The Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting from A. Overholt & Co., West Overton Distilling Company, the estate of R. B. Mellon, A. W. Mellon, and the estate of Henry C. Frick any additional amounts as income taxes on the income for the year 1920 of A. Overholt & Co. and the income for 1920 of West Overton Distilling Company.

9. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and

West Overton Distilling Company, or either of them, earned during 1920, was income from property held in trust.

10. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, on which the taxes involved in this action were assessed and collected, was income of a taxable trust or trusts.

11. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. earned during 1920, or the income of West Overton Distilling Company earned during 1920, was not distributed or distributable to R. B. Mellon, if such a trust or trusts existed.

12. Plaintiffs are estopped to assert and claim that any portion of the income of A. Overholt & Co. and West Overton Distilling Company, or either of them, earned during 1920, on which the taxes in controversy in this action were assessed and collected, was not taxable to R. B. Mellon while receiving the benefit resulting from the inability of the Commissioner of Internal Revenue and the United States to assess and collect any amounts as the income tax liabilities of said organizations for the year 1920.

13. Plaintiffs are estopped to assert and claim that the deficiency asserted, determined and assessed by the Commissioner of Internal Revenue against R.

B. Mellon for the year 1920, was not lawfully assessed and legally collected.

14. If A. Overholt & Co. and West Overton Distilling Company were taxable trusts in 1920, then at the time the additional tax for the year 1920, in controversy was determined, assessed and collected, R. B. Mellon was indebted to the United States as trustee, transferee, or distributee of the assets of A. Overholt & Co. and West Overton Distilling Company in respect of income taxes on the income thereof for the year 1920 in an amount in excess of the amount of $187,787.17, collected by the defendant from R. B. Mellon as a deficiency in tax and interest thereon for the year 1920.

15. In equity and good conscience the plaintiffs ought not to recover of and from the defendant herein.

16. The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected by the defendant from R. B. Mellon.

17. The pleadings, and the evidence in this case, with every inference of fact that may be drawn from it, are insufficient in law to warrant a judgment against this defendant.

18. Under the law and the evidence, the record does not contain any substantial evidence to support findings of fact and conclusions of law and judgment in favor of the plaintiffs and against the defendant.

19. The defendant, on the pleadings and the evidence in this case, is entitled to judgment dismissing plaintiffs' statement of claim, at plaintiffs' costs.

In the event the Court fails or refuses to make, adopt, or enter the foregoing findings of fact and conclusions of law, or any thereof, defendant respectfully excepts and prays that he be allowed an exception or exceptions to such action and ruling of the Court; and defendant further excepts and prays that he be allowed an exception to any ruling and action of the Court in making and entering any other findings of fact and conclusions of law, or either thereof.

Thereupon counsel for plaintiffs and defendant presented their oral arguments to the Court, upon conclusion of which arguments leave was granted to file written briefs on submission of the cases.

Each of said parties thereafter on or about December 10, 1934, timely filed their written briefs.

Thereupon, on December 10, 1934, plaintiffs in said consolidated causes filed their written request for findings of fact and conclusions of law in words and figures as follows:

Request for Findings of Fact and Conclusions of Law.

(Captions—Nos. 6980 and 6979 Law.)

And Now, December 10, 1934, come plaintiffs, by their attorneys, and respectfully request the Court to

make the following findings of fact and conclusions of law in the above-entitled cases:

FINDINGS OF FACT.

1. Mr. A. W. Mellon and Mr. R. B. Mellon filed separate individual income tax returns for the calendar year 1920 and duly paid to the Collector the amounts of taxes shown thereon to be due. Plaintiffs at all times here material kept their books and filed their income tax returns on the cash receipts and disbursements basis of accounting.

2. By letters dated February 21, 1927, the Commissioner of Internal Revenue (hereinafter called the "Commissioner") notified plaintiffs that an examination of said returns and of plaintiffs' books of accounts and records for the year 1920 disclosed deficiencies in the amounts of $190,419.70 and $175,259.70, respectively. Thereafter the Commissioner assessed the proposed deficiencies, and on demand from the defendant, the deficiencies, together with interest, were paid as follows: $190,419.70 tax and $12,082.50 interest by Mr. A. W. Mellon on April 2, 1927, and $175,259.70 tax and $12,527.47 interest by Mr. R. B. Mellon on May 19, 1927.

3. The additional tax so assessed for the year 1920 was the result of the action of the Commissioner adding to the plaintiffs' income, profit alleged to have been realized in the year 1920 from the sale of whiskey certificates by A. Overholt & Company and West Over-

ton Distilling Company, two partnerships in process of liquidation.

4. Prior to December 12, 1918, the two distilleries were owned and operated by two separate corporations, to-wit, A. Overholt & Company and West Overton Distilling Company. The manufacture of whiskey was discontinued in December, 1916. In December, 1917, Congress submitted the Eighteenth Amendment to the states for ratification. In November, 1918, Congress passed the Wartime Prohibition Act, effective July 1, 1919. On January 16, 1919, the requisite number of states had ratified the Eighteenth Amendment effective January 16, 1920.

5. In the fall of 1917 the stockholders of the two corporations decided to liquidate the businesses, and on December 12, 1918, they formed two partnerships under the same names as the corporations to take over and liquidate the assets, businesses and affairs of the two corporations. The partners were A. W. Mellon, R. B. Mellon and H. C. Frick, their interests being equal. The partnership agreements provided that "In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable."

6. Mr. H. C. Frick died on December 2, 1919. No new partnership agreements were entered into by the two surviving partners, nor since then have any partnership agreements ever existed between the surviving partners or between the surviving partners and the personal representatives of the deceased partner relative to the businesses of the former partnerships.

7. After the discontinuance of the manufacture of whiskey in December, 1916, no distilling operations were ever carried on and no distiller's license or permit was applied for or granted. All sales of assets of the former partnerships were made under the then existing laws, both Federal and State, relating to the sale and transportation of distilled spirits or intoxicating liquors. The whiskey then in storage was sold on certificate and only withdrawn on application to and permit from the Federal Government. As a necessary part of the sale on certificate, the whiskey was bottled at the distilleries. Whiskey was sold on certificate until the end of 1920 at which time the surviving partners decided not to sell unless they could sell all the partnerships' assets including the balance of the whiskey to some one person or concern. From 1921 until 1925 negotiations were had with several parties relating to sale of the distilleries and whiskey in bulk, and the distilleries and whiskey were finally sold as a unit in the year 1925.

8. On January 1, 1920, A. Overholt & Company had accounts payable of $192,610.85 and on December

31, 1920, of $9,370.06. During the year 1920 the Commissioner claimed additional income taxes from the two corporations for the years 1916, 1917 and 1918 in the amount of about $550,000.00, which were finally settled on December 28, 1928, and for which the assets of the former partnerships were liable.

9. Mr. R. B. Mellon, as managing partner of the surviving partners of both partnerships, was advised by counsel that no distribution could be made in 1920 until certain questions had been settled, to-wit, the possibility of a floor tax being levied by the Government, the possibility of being required to remove the whiskey to a Government warehouse and the possibility of being required to bottle the whiskey then in storage in barrels, and the immediate imposition of the Internal Revenue tax on such bottling, together with the additional expense involved in bottling. If any of these matters or policies had been adopted by the Government, the surviving partners would have been required to spend large sums of money.

10. No distribution of any profits or of any return of capital was made by the surviving partners or by the liquidating agent to the surviving partners as individuals or to the estate of the deceased partner during the year 1920 or during any subsequent year until after final liquidation in 1925.

11. Plaintiffs, while liquidating the businesses of the two former partnerships, kept the assets of the said

former partnerships, including cash, separately, treating the same as trust properties, and did not include such assets or cash with their own assets or cash. The books and records of the two former partnerships were kept on the accrual basis of accounting.

12. Loans were made to the surviving partners prior to 1920, during 1920, and to the surviving partners and the estate of the deceased partner after 1920, all of which were finally paid back either prior to or upon final liquidation.

13. The liquidation of the two distilleries was finally consummated, and distribution was made by the said liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925.

14. The alleged profit for 1920, as computed and taxed by the Commissioner, did not exceed the cost basis of the former partner's interest in the partnership.

15. On January 31, 1921, the surviving partners appointed The Union Trust Company of Pittsburgh as liquidating agent, and the liquidating agent continued the liquidation of the businesses in the same manner except that no sales of whiskey were thereafter made until 1925 when all assets including distilleries were sold.

16. In the year 1920 the surviving partners realized profits from bottling, storage and sale of barrels.

This profit was reported for income tax purposes on a return of income designated "Partnership and Personal Service Corporation Return of Income," form 1065, and the returns disclosed the share of such profit of the two surviving partners and of the estate of the deceased partner but did not state whether such share was distributable, distributed or not. Each of said returns also disclosed a computed profit on the sale of whiskey certificates which was not reported as income but claimed to be the conversion of capital assets and not taxable until the proceeds exceed the cost basis of the former partners' interests.

17. On the individual income tax returns for 1920 filed by plaintiffs, each plaintiff took up and reported as income his so-called share, whether distributed or not, of the net income of A. Overholt & Company and West Overton Distilling Company, as shown upon the aforesaid returns of said former partnerships but they did not take up any of the proceeds from the sale of whiskey certificates.

18. Plaintiffs duly filed separate individual income tax returns for the years 1921 to 1925, both inclusive, and reported their share of the so-called profits or losses of the liquidating agent of the partnerships of A. Overholt & Company and West Overton Distilling Company and each paid the tax on the profit so reported.

19. After the Commissioner had collected the aforesaid additional tax for the year 1920, assessed by

him on the sales of whiskey certificates in that year, to-wit, in April and May, 1927, he, on or about November 14, 1928, reversed his position and held that the liquidation of the two companies was consummated in 1925 and the profit and losses reported by plaintiffs on their returns for 1924 from the liquidation of A. Overholt & Company and West Overton Distilling Company should be eliminated.

20. The Commissioner in examining the income tax returns filed by plaintiffs for the year 1925 included in income for that year the differences between the cost values of said partnerships as of December 2, 1919, and the amounts received in final liquidation, including the so-called profits and losses for the years 1920 to 1924, inclusive. The amounts actually received in liquidation in the year 1925 as determined by the Commissioner, included the so-called profits and losses of the liquidating agent for all said years, including the year 1920, which had already been taxed by the Commissioner as income for that year.

21. In his final deficiency letters to plaintiffs, dated March 15, 1929, covering the year 1925, the Commissioner notified plaintiffs that deficiencies would be assessed unless appeals were taken to the United States Board of Tax Appeals within sixty days. Plaintiffs took no appeals and the deficiencies were assessed and payments were duly made. The deficiencies arose by virtue of the Commissioner's action in determining a profit on the liquidation of the said partnerships of

A. Overholt & Company and West Overton Distilling Company in excess of that reported. He eliminated from ordinary income the so-called current profits for the year 1925 reported by plaintiffs on their tax returns from the liquidation of said partnerships, and included as capital gain the entire net profit on the liquidation, including the so-called profit for the year 1920 upon which the additional assessment for that year was based, giving the following explanation: "Profit reported on the liquidation of A. Overholt & Company and West Overton Distilling Company has been eliminated as it is held that the profit on the liquidation of the above companies is capital net gain."

22. The Commissioner determined and settled the Federal tax liability of the Estate of Henry C. Frick, the deceased partner, for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year, but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis.

23. This settlement of the tax liability of the Estate of Henry C. Frick was first discussed in a letter from the Bureau of Internal Revenue, dated December 14, 1927, and was finally made in 1928.

24. The contents of the said letter were communicated to W. A. Seifert, Esq., as attorney for the sur-

viving partners, and he stated to counsel for the Frick Estate that the same settlement would be satisfactory to them, and the conferees of the Bureau of Internal Revenue in Washington were so advised.

25. On or about March 19, 1929, plaintiff, A. W. Mellon, filed with defendant claim for refund of $194,160.75 or such greater amount as is legally refundable, and plaintiff, R. B. Mellon, filed with defendant claim for refund of $187,787.17, or such greater amount as is legally refundable. The claims for refund were not filed until after the Commissioner issued his final deficiency letter for the year 1925 (March 15, 1929).

26. More than two years after the filing of the claims for refund, the Commissioner again reversed his position, and as to the year 1924, included in the tax computation of the plaintiffs the profits and losses realized on the liquidation of A. Overholt & Company and West Overton Distilling Company.

Facts with Respect to Estoppel.

27. A return of income for the year 1920 by A. Overholt & Company and for West Overton Distilling Company was duly filed by Richard B. Mellon, one of the surviving partners, on or about March 15, 1921, on form 1065, Partnership and Personal Service Corporation Return of Income. No return of income was filed for either A. Overholt & Company or West Overton Distilling Company for the year 1920 on the form prescribed for the making of returns by fiduciaries of a trust.

28. Both fiduciary and partnership forms of return serve the same purpose. They are returns of income which disclose the specific items of income and of deductions and the distributable or non-distributable income.

29. After the death of Mr. Frick there was no change in the manner of liquidating the businesses. The fact that the partnerships were in liquidation was made known to the Commissioner on the returns of income filed for A. Overholt & Company and for West Overton Distilling Company for the year 1920. The returns for both former partnerships and of both plaintiffs were examined and the books of accounts and the records audited at the same time by the same Revenue Agent, Albert W. Smith, and his reports on all four returns are dated November 8, 1921. These reports on the former partnerships refer to each other. The return filed by A. Overholt & Company leaves blank the answer to the questions stated on the first sheet, to-wit, "Kind of business," and "State whether Partnership or Corporation." It is signed on the first page by Richard B. Mellon, who is designated "Member of Partnership." On the second page, in answer to question 3 (b), it is stated in large type that it is a "partnership in liquidation," and on a special schedule, attached thereto, it is stated:

> "The partnership of A. Overholt & Co., consisted of A. W. Mellon, R. B. Mellon and Henry C. Frick and was created on December 30, 1918,

for the purpose of liquidating the assets of A. Overholt & Co., a Pennsylvania Corporation.

"Mr. Frick died on December 4, 1919, and, under the laws of the State of Pennsylvania, Messrs. A. W. and R. B. Mellon were, as surviving partners, required to carry on the liquidation of the assets of the copartnership.

"On February 1, 1921, Messrs. Mellon, as liquidating partners, transferred all of the assets, real, personal and mixed of the copartnership, to The Union Trust Company of Pittsburgh, as liquidating agent."

30. The return of West Overton Distilling Company states, in answer to Question 3 (b), that it is "in liquidation."

31. The Revenue Agent's report on A. Overholt & Company for 1920 states:

"The taxpayer has set aside a portion of profits under the caption of liquidation, claiming that this is to apply as a return of capital. Taxpayer agrees to waive this claim provided the Government agrees to settle on the basis of this report."

32. The Revenue Agent's report on West Overton Distilling Company for the year 1920 states:

"The Liquidating Profit set aside in 1920 was disallowed and the taxpayer has agreed to this on the condition that the Government accepts the whole report as amended here for the years 1918,

1919 and 1920 and agrees to definitely settle on this basis—I recommend that the Department close the case."

33. The Commissioner did not agree to settle on the basis of the Revenue Agent's report and disallowed the deduction for obsolescence of goodwill not claimed on the return but claimed at time of examination and allowed by the Revenue Agent. He increased the profit from the liquidation of the two former partnerships by including therein an alleged profit on the sale of whiskey certificates which he alleged was realized and taxable in 1920.

34. In none of the protests or briefs offered in evidence by defendant as being submitted by plaintiffs to the proposed increase in the net taxable income of either A. Overholt & Company or West Overton Distilling Company with respect to tax liability for the year 1920, to-wit,

Appeals executed January 19, 1923,
Protests executed January 29, 1927,
Memorandum briefs executed February 11, 1927,

nor with respect to the tax liability for the year 1925, to-wit,

Protest and brief executed June 21, 1928,

did plaintiffs raise the legal point that the partnerships had been dissolved by the death of Mr. Frick and that the surviving partners became as a matter of law liquidating trustees and, as such, taxable as a

separate entity. It was raised in the claims for refund filed March 19, 1929, and in a brief filed on November 22, 1932, and then only after the Commissioner had refused to act upon the claims for refund for 1925, which were filed as a protective measure. There is no evidence that no other briefs or protests were filed or that the issue was not raised at any conference.

35. There was no concealment or misrepresentation of any fact with respect to the death of Mr. Frick or to the fact that the partnerships were in the process of liquidation, but these facts were stated affirmatively in the partnership returns. The Commissioner knew of Mr. Frick's death and made a settlement with his executors on a basis which differed from his assessments against the other partners.

36. The Commissioner's inconsistent determinations with respect to the net income of A. Overholt & Company and West Overton Distilling Company during the period of liquidation are respectively set forth as follows:

1. All profit, whether from bottling or otherwise, was taxable income in 1920. (R. A. R. letters of Feb. 9, 1922.)
2. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of September 14, 1927.)
3. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of November 14, 1928.)

4. All profit was realized from final liquidation. (Notice of Deficiency for 1925, March 15, 1929.)
5. Profit on sale of whiskey was realized and taxable in 1920. (Letters dated April 16, 1932; letters dated February 27, 1934; letters dated April 6, 1934.)

37. The Commissioner did not reverse his determination that all profit was realized and taxable upon final liquidation in 1925 until after the praecipes for summons had been issued in the instant cases, nor did he actually disallow the claims for refund until approximately two years after the filing thereof and after the statements of claim had been filed in the instant cases.

38. If any taxable income was realized by said trusts for A. Overholt & Company in the year 1920 from bottling, storage and sale of barrels, the amount thereof was ($48,350.74 x 3) $145,052.22 and from the sale of whiskey certificates the amount thereof was ($233,429.21 x 3) $700,287.63, and for West Overton Distilling Company was ($5,960.55 x 3) $17,881.65 and ($52,814.28 x 3) $158,442.84, respectively.

Facts with Respect to Third Defense.

39. On or prior to December 31, 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Company and West Overton Distilling Company were distributed to plaintiffs and the Estate of H. C. Frick, leaving said organizations with no as-

sets or property. The amount of money, together with the value of property so received by each plaintiff in distribution from A. Overholt & Company was in excess of $551,914.70 and from West Overton Distilling Company was in excess of $66,673.42.

40. Distribution was made prior to the date of the additional assessments for both 1920 and 1925.

41. The United States has already collected a tax on the alleged profit for 1920 upon distribution in final liquidation in 1925.

CONCLUSIONS OF LAW.

1. No taxable gain is realized during the liquidation of a partnership dissolved by the death of a former partner, until the proceeds realized exceed the cost bases to the former partners of their partnership interests.

2. The assets of a partnership which ordinarily might be considered stock in trade of a going business become capital assets when the partnership is dissolved by the death of a partner and the partnership interests are in process of liquidation.

3. On the sale of such capital assets by such partnership in liquidation, profits may not be computed and taxed prior to final liquidation.

4. Plaintiffs are entitled to recover for the full amount of their claims, together with interest according to law.

If conclusions of law 1, 2, 3 and 4 are answered in the negative, then as an alternative plaintiffs' request the Court to make the following conclusions of law:

5. The surviving partners of a partnership dissolved by the death of one of the partners are liquidating trustees and taxable as a separate entity.

6. If the surviving partners, as liquidating trustees, were taxable as trusts, the Commissioner and the United States are not precluded from assessing and collecting a tax on the income, if any, realized by the said trusts.

7. The surviving partners, as individuals, are not estopped to assert that, as a matter of law, the tax paid by them as individuals should have been paid by the liquidating trustees, a separate taxable entity.

8. The doctrine of estoppel cannot be invoked by the defendant as there has been no concealment or misrepresentation of any material fact and there has been full disclosure by plaintiffs of the facts upon which the question of law now raised by plaintiffs could at any time have been decided.

9. The doctrine of estoppel cannot be invoked by defendant as the mistake, if any, was one of law.

10. The collection of any tax for the year 1920 from plaintiffs as transferees of the assets of the two former partnerships is barred by the statute of limitations.

11. Under the facts in these cases the plaintiffs are not barred from recovery by any doctrine in the nature of recoupment.

12. Neither estoppel nor recoupment can be invoked by defendant as it was at all times in possession of the facts necessary to a correct legal determination of tax liability.

13. Neither estoppel nor recoupment can be invoked by the Government as it has collected a tax from plaintiffs on the same income in two different years, has not made a tender of the return of the tax for either year, and as it has shifted from one legal position to another and back again to the detriment of the plaintiffs.

14. Plaintiffs are entitled to recover for the full amount of the claims, together with interest according to law.

Thereafter and on the 17th day of February, 1936, the Court filed its special findings of fact, conclusions of law and memorandum opinion in each of said cases herein, deciding in favor of the plaintiffs and against the defendant, and thereupon, on said date, entered orders that judgments be entered in favor of plaintiffs for the amounts claimed by them, respectively, with interest according to law; and thereupon, on said date, entered its orders overruling and denying defendant's motions for judgments as to each specific ground there-

in contained and allowed timely exceptions as made to each ground thereof.

At the bottom of each of defendant's said motions for judgment appears the following endorsement by the Court:

And now, to wit, February 17, 1936, motion denied.

(Signed) *Per Curiam,*

G.

And now, to wit, February 17, 1936, at the request of the United States Attorney, exception is noted to the foregoing order and bill sealed.

(Signed) R. M. GIBSON, (SEAL)
District Judge.

Thereupon, on said 17th day of February, 1936, the Court entered its orders herein specifically making and finding its separately numbered findings of fact and conclusions of law in each of said causes, respectively, and allowed defendant timely exceptions as made to each and every of the special findings of fact and each and every of the conclusions of law so adopted in each of said causes made and contained in said orders of the Court, and allowing defendant timely exceptions to the orders for judgment against defendant in each of said cases, all of which said findings of fact and conclusions of law of the Court, in each of said causes, are incorporated herein and made parts hereof by refer-

ence of the same as if fully set out, even though printed elsewhere in the transcript of record as parts of the strict or primary record on appeal.

Thereupon, and on said 17th day of February, 1936, judgments were entered in favor of plaintiffs in each of said causes in accordance with said orders for judgment and findings of fact and conclusions of law entered and adopted as aforesaid, over the objections and subject to the exceptions of defendant.

And thereupon, on said 17th day of February, 1936, the Court entered its orders rejecting and overruling each and every of defendant's requests for findings of fact numbered 1, and 3 to 43, both inclusive, in each of said causes respectively, and allowed defendant timely exceptions as made to the refusal of the Court to make and enter each specific finding of fact and each specific conclusion of law so requested by defendant in each of said causes.

At the bottom of defendant's said motions for special findings of fact and conclusions of law appear the following endorsements by the Court:

(Caption No. 6980 Law.)

And now, to wit, February 17, 1936, motion denied except as to such findings as appear in findings by the court filed with opinion.

(Signed) *Per Curiam,*

G.

And now, to wit, February 17, 1936, at the request of the United States Attorney, exception is noted to the foregoing order and bill sealed.

(Signed) R. M. GIBSON, (SEAL)
District Judge.

(Caption No. 6979 Law.)

And now, to wit, February 17, 1936, motion refused except as to such findings as appear in findings of fact by the court filed with opinion.

(Signed) *Per Curiam,*
G.

And now, to wit, February 17, 1936, at the request of the United States Attorney, exception is noted to the foregoing order and bill sealed.

(Signed) R. M. GIBSON, (SEAL)
District Judge.

Thereafter and on April 16, 1936, upon written motion of defendant, consented to in writing by counsel for plaintiffs, the Court made and entered its timely orders extending the term of this Court, and the time for signing, allowance and filing of defendant's bill of exceptions in each of said causes, to July 1, 1936, which said orders are in words and figures as follows:

ORDER.

(Caption No. 6980 Law.)

ORDERED, ADJUDGED AND DECREED, that the time for the signing, allowance and filing of the

bill of exceptions of defendant is hereby extended to July 1, 1936 and it is further ordered that the present term of this Court be and the same hereby is, extended for said purpose until the expiration of said extended term.

(Signed) R. M. GIBSON,
District Judge.

Dated, April 16, 1936.

ORDER.

(Caption No. 6979 Law.)

ORDERED, ADJUDGED AND DECREED, that the time for the signing, allowance and filing of the bill of exceptions of defendant is hereby extended to July 1, 1936 and it is further ordered that the present term of this Court be and the same hereby is, extended for said purpose until the expiration of said extended term.

(Signed) R. M. GIBSON,
District Judge.

Dated, April 16, 1936.

Thereafter and on June 10, 1936, the plaintiffs and defendant, by their respective counsel, entered into a written stipulation, in each of said causes, whereby it was agreed that the time of defendant-appellant for docketing and filing his transcript of record on appeal

may be extended to July 10, 1936, whereupon, on June 10, 1936, the Court, for good cause shown, timely made and entered the following orders:

ORDER.

(Caption No. 6980 Law.)

In accordance with the foregoing stipulation the time for filing the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out, is extended until the tenth day of July, 1936.

(Signed) R. M. GIBSON,
Judge.

Dated: This 10th day of June, 1936.

ORDER.

(Caption No. 6979 Law.)

In accordance with the foregoing stipulation the time for filing the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out, is extended until the tenth day of July, 1936.

(Signed) R. M. GIBSON,
Judge.

Dated: This 10th day of June, 1936.

Thereafter and on June 20, 1936, plaintiffs and defendant, through their respective counsel, entered into and duly filed written stipulations in each of said causes, agreeing to a further enlargement of the time to August 1, 1936, for signing, allowance and filing of defendant's bill of exceptions, and to August 10, 1936, for defendant-appellant to file transcripts of record on appeal, which stipulations are in words and figures as follows:

STIPULATION.

(Caption No. 6980 Law.)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the signing, allowance and filing of the bill of exceptions of defendant may be extended to August 1, 1936; and that the time of the appellant to file a transcript of the record on appeal may be extended to August 10, 1936.

(Signed) REED, SMITH, SHAW & MCCLAY,
(Signed) WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiff.
(Signed) CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania.
(Signed) ORRIS BENNETT,
Special Assistant to the U. S. Attorney.
Attorneys for the Defendant.

STIPULATION.

(Caption No. 6979 Law)

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the signing, allowance and filing of the bill of exceptions of defendant may be extended to August 1, 1936, and that the time of the appellant to file a transcript of the record on appeal may be extended to August 10, 1936.

(Signed) REED, SMITH, SHAW & MCCLAY.
(Signed) WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiffs.

(Signed) CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania.

(Signed) ORRIS BENNETT,
Special Assistant to the U. S. Attorney.
Attorneys for the Defendant.

Thereupon and on June 20, 1936, the Court made and entered its timely orders further extending the term of Court (theretofore extended by order to July 1, 1936) in each of said causes, to August 1, 1936, for the signing, allowance and filing of defendant's bill of exceptions and to August 10, 1936, for the filing of the transcripts of record on appeal, which said orders are in words and figures as follows:

ORDER.

(Caption No. 6980 Law)

In accordance with the foregoing stipulation, it is ordered, adjudged and decreed that the time for the signing, allowance and filing of the bill of exceptions of defendant be and the same hereby is, extended to August 1, 1936, and that the prior term of this court (heretofore extended by order to July 1, 1936) be and the same hereby is, extended for said purpose until the expiration of said extended time.

It is further ordered that the time for the filing of the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out (said time heretofore having been extended to July 10, 1936) be and the same hereby is, extended until the tenth day of August, 1936.

Dated this 20 day of June, 1936.

(Signed) R. M. GIBSON,
Judge.

ORDER.

(Caption No. 6979 Law)

In accordance with the foregoing stipuluation, it is ordered, adjudged and decreed that the time for the signing, allowance and filing of the bill of exceptions of defendant be and the same hereby is, extended for said purpose until the expiration of said extended time.

It is further ordered that the time for the filing of the record in this case in the Circuit Court of Appeals pursuant to the appeal sued out (said time heretofore having been extended to July 10, 1936) be and the same hereby is, extended until the tenth day of August, 1936.

Dated this 20 day of June, 1936.

(Signed) R. M. GIBSON,
Judge.

Thereafter, and on June 20, 1936, plaintiffs and defendant, by their respective counsel, made and entered into a written stipulation, agreeing that each of the above causes be consolidated for all purposes of appeal, which said stipulation was duly entitled and filed in said causes, and is in words and figures as follows:

STIPULATION.

(Captions Nos. 6980 and 6979 Law)

It is stipulated and agreed by the attorneys for the respective parties that the two above-entitled actions may be consolidated for all purposes of appeal, that one bill of exceptions shall be sufficient for both cases, and that the records on appeal in these cases may be consolidated, printed

and filed as one record, and that the Court may enter an order accordingly.

(Signed) REED, SMITH, SHAW & MCCLAY,
(Signed) WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiffs.

(Signed) CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania.

(Signed) ORRIS BENNETT,
Special Assistant to the U. S. Attorney.
Attorneys for the Defendant.

Thereupon, and on June 20, 1936, the Court made and entered its order, consolidating said causes for the purpose of appeal and ordered that one bill of exceptions shall be sufficient for both cases and that only one record shall be required on appeal, which order is in words and figures as follows:

ORDER.

(Captions Nos. 6980 and 6979 Law)

In accordance with the foregoing stipulation it is ordered that the above-entitled actions be consolidated for the purpose of appeal, that one bill of exceptions shall be sufficient for both cases, and that the records on appeal be consolidated, printed and filed as one record.

(Signed) R. M. GIBSON,
D. J.

Dated June 20, 1936.

By virtue of an order of the presiding judge made in accordance with stipulation between the parties hereto, Plaintiffs' Exhibit 5 and Defendant's Exhibits "A", "B", "X", "Y", "DD", "HH", "II", "JJ", "KK", "LL", "MM", "NN", "OO", "PP" and "QQ", and Defendant's Exhibit "LLL", parts of which are omitted from this bill of exceptions, are being transmitted by the Clerk of the District Court in compliance with said order direct to the Circuit Court of Appeals, said stipulation and order reading respectively as follows:

STIPULATION.

(Captions Nos. 6980 and 6979 Law)

It is hereby stipulated and agreed by and between the parties hereto, acting by and through their respective counsel of record herein, that plaintiffs' original exhibit 5 and defendant's original exhibits "A", "B", "X", "Y", "DD", "HH", "II", "JJ", "KK", "LL", "MM", "NN", "OO", "PP" and "QQ", and defendant's exhibit "LLL" may be submitted to the United States Circuit Court of Appeals for the Third Circuit, and if a review of these causes is had by the Supreme Court of the United States, then also to that Court in order that said Court or Courts may, if deemed necessary or desirable, have an opportunity of examining the whole of said exhibits in their original photostatic form.

It is further stipulated and agreed that an order may be made approving this stipulation.

Dated this 30th day of June, 1936.

(Signed) REED, SMITH, SHAW & MCCLAY,
(Signed) WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiffs.
(Signed) CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania.
(Signed) ORRIS BENNETT,
Special Assistant to the U. S. Attorney.
(Signed) GEO. H. ZEUTZIUS,
Special Assistant to the Attorney General.
Attorneys for the Defendant.

ORDER.

Upon reading and filing the foregoing stipulation and sufficient cause appearing therefor, it is ORDERED, and this does order that the same be and hereby is approved.

Done at Pittsburgh this 30 day of June, 1936.

(Signed) R. M. GIBSON,
District Judge.

Now therefore, in furtherance of justice and that right may be done, and forasmuch as said exceptions of the defendant do not otherwise appear of record, said defendant tenders and presents this, his bill of

exceptions, in the above consolidated causes to the action of the Court in the various particulars herein specifically set out; and prays that all of said evidence contained in the foregoing bill of exceptions, together with the several exhibits, stipulations, motions, rulings, orders, and other papers copied and inserted therein be allowed in such form as being necessary to a proper understanding of the questions presented by said bill of exceptions, and that said bill of exceptions may be approved, settled, allowed and signed and sealed by the Court and made a part of the record.

CERTIFICATE AND ORDER APPROVING AND SETTLING THE BILL OF EXCEPTIONS.

(Captions Nos. 6980 and 6979 Law.)

I, the undersigned, the United States District Judge who presided at the trial of the above entitled causes, do hereby certify that the foregoing bill of exceptions duly and timely proposed and agreed upon by counsel for the respective parties, contains all the testimony, exhibits, stipulations, motions, rulings, orders, and other papers and proceedings and other evidence introduced and had upon the said trial of said causes, and that all of said evidence which is set out in said bill of exceptions by question and answer is in the opinion of said District Judge necessary and proper for

the presentation of the questions raised and for a proper understanding of the questions presented by said bill of exceptions, and further that it is necessary to a proper understanding of said questions to incorporate herein the documentary evidence at length, including all the evidence, stipulations of facts read into the record and agreed to by counsel for the respective parties, motions, rulings, orders, and other papers to the extent that the same has been done herein; and I hereby settle and allow said foregoing bill of exceptions as a full, true and correct bill of exceptions in these causes and order the same filed as part of the record herein.

That each and every of the exceptions taken by counsel for defendant on the questions of evidence propounded during the course of the trial as shown by the foregoing transcript of the evidence and proceedings were timely taken and then and there duly allowed, and defendant's counsel requested that the seal of the Court should be put thereto, which was done according to the form of the statute in such cases made and provided.

I further certify that the foregoing bill of exceptions conforms to all local rules relating to the presenting, settling, and filing of a bill of exceptions, and that the foregoing bill of exceptions is presented, settled, allowed, sealed and ordered filed within the term of this Court in which the

decisions and judgments in said causes were rendered as timely extended.

Dated and sealed this 30th day of June, 1936.

ROBERT M. GIBSON (SEAL)
ROBERT M. GIBSON,
District Judge.

The foregoing bill of exceptions has been examined, approved and agreed upon this 30th day of June, 1936.

REED, SMITH, SHAW & MCCLAY,
by WILLIAM WALLACE BOOTH,
Attorneys for Plaintiffs.

Stipulation as to Printing Record.

(Filed July 3, 1936.)

And now, to wit, June 30, 1936, it is hereby stipulated by and between the respective counsel in the above-entitled cases, which have been consolidated by agreement of counsel and order of court, that the following be printed as and constitute, (together with Plaintiffs' Exhibit "5" and Defendant's Exhibits "A", "B", "X", "Y", "DD", "HH", "II", "JJ", "KK", "LL", "MM", "NN", "OO", "PP", "QQ", and "LLL", which are to be separately certified to the Circuit Court of Appeals and transmitted with the transcript of record) the consolidated record on ap-

peal in said cases before the United States Circuit Court of Appeals for the Third Circuit.

1. Docket entries, in each case.
2. Statement of claim, with annexed exhibits "A", "B", "C", "D" and "E", in each case.
3. Suggestion of death and motion for substitution of executors and order; also accompanying certificate of Register for the probate of wills, in Law No. 6979.
4. Amended affidavit of defense with annexed notice, application and order, in each case.
5. Reply to affidavit of defense, in each case.
6. Stipulation waiving jury trial, in each case.
7. Opinion of the Court (which includes Court's findings of fact, conclusions of law and discussion) together with attached order for judgment in each case.
8. Motion and order of court extending to July 1, 1936, the term of court and the time for signing, allowance and filing of bill of exceptions, in each case.
9. Stipulation and order of court extending the time for appellant to file transcript of record on appeal to July 10, 1936, in each case.
10. Stipulation and order of court extending the time and term of court for the signing allow-

ance and filing of bill of exceptions to August 1, 1936, and for filing transcript of record to August 10, 1936, in each case.

11. Stipulation and order of court consolidating cases for purposes of appeal.

12. Petition for appeal and order allowing same, in each case.

13. Assignment of errors, in each case.

14. Bill of exceptions with certificate.

15. This stipulation.

16. Certificate of Clerk.

REED, SMITH, SHAW & MCCLAY,
WILLIAM WALLACE BOOTH,
Attorneys for the Plaintiffs.

CHARLES F. UHL,
United States Attorney for the Western District of Pennsylvania.

ORRIS BENNETT,
Special Assistant to U. S. Attorney.
Attorneys for the Defendant.

Certificate of Clerk.

Western District of Pennsylvania, ss.:

I, G. H. BERGER, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record on appeal in the above entitled case, so full and entire, as the same remains on record and file in my office in the City of Pittsburgh, in said district, in accordance with the notice filed by counsel.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of said Court, at Pittsburgh, this .... day of ....., A. D. 19.....

G. H. BERGER,
Clerk.

(SEAL)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 6151. October Term, 1936

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

JENNIE KING MELLON ET AL., EXRS. OF THE EST. OF R. B. MELLON, DECEASED, APPELLEES

No. 6152. October Term, 1936

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

A. W. MELLON, APPELLEE

And afterwards, to wit, the 13th day of November 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 15th day of March 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

United States Circuit Court of Appeals, for the Third Circuit

No. 6151. October Term, 1936

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, APPELLANT

v.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE AND THE UNION TRUST COMPANY OF PITTSBURGH, EXECUTORS OF THE ESTATE OF R. B. MELLON, DECEASED, APPELLEES

No. 6152. October Term, 1936

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, APPELLANT

v.

A. W. MELLON, APPELLEE

Upon Appeal from Judgments of the District Court for the Western District of Pennsylvania

Opinion

Filed March 15, 1937

Before BUFFINGTON, DAVIS, and THOMPSON, Circuit Judges

THOMPSON, J.: These are appeals from judgments of the District Court for the Western District of Pennsylvania. The cases were tried by stipulation without a jury. The facts are as follows:

In 1918 R. B. Mellon, A. W. Mellon, and H. C. Frick entered into partnership agreements to do business under the names of A. Overholt & Company and West Overton Distilling Company for the purpose of liquidating two whiskey distilling corporations of the same names. No new stock was to be manufactured or purchased, the sole purpose of the partnership being to liquidate the assets of the former concerns. In 1919 Frick died. No new partnership agreements were entered into by the two surviving partners, R. B. Mellon and A. W. Mellon. In 1921 the surviving partners appointed the Union Trust Company of Pittsburgh trustee and liquidating agent. The two partnerships were finally liquidated and distribution made to the surviving partners and to the estate of the deceased partner in 1925. In 1921 separate income tax returns were filed in the names of the partnerships on official partnership forms. R. B. Mellon signed the returns "Richard B. Mellon—Member of Partnership" setting forth as the other members of the partnership, A. W. Mellon and the estate of H. C. Frick. The Commissioner increased the net income of each of the partnerships so as to include profits realized from sales of whiskey in 1920. The distributive shares of R. B. Mellon and A. W. Mellon, as members of this partnership, were similarly increased. Deficiencies in the individual income tax returns of R. B. Mellon and A. W. Mellon were assessed and collected by the Commissioner in 1927. Claims for refund were filed with the Commissioner in 1929 and were rejected by him in 1934. R. B. Mellon and A. W. Mellon thereupon brought actions at law for the recovery of the income taxes alleged to have been erroneously collected by the Commissioner.

The District Court found that the partnerships were dissolved by the death of Frick in 1919 and that the assets of the partnerships thereupon changed character from stock in trade to capital assets. It concluded that the surviving partners did not realize any taxable income from the sale of the whiskey until the amount actually received from the partnerships equalled and exceeded the cost value

and interests of the surviving partners in the partnerships as of the date of the death of the deceased partner. It held that R. B. Mellon and A. W. Mellon were therefore entitled to the claimed refunds.

The question is whether the profits derived from the sale of whiskey in 1920 were taxable in that year. Article 1570 of Regulations 45 promulgated under the Revenue Act of 1918 reads:

"When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid. * * *"

In Pennsylvania the death of one of the partners dissolves the partnership. Froess, Admx., v. Froess, 284 Pa. 369. Uniform Partnership Act of March 26, 1915, P. L. 18 sec. 31 (d) (4). The above quoted Regulation therefore became pertinent after the death of Frick in 1919. When Frick died and the partnerships were thereby dissolved, no gain was realized until such time as each surviving partner and the representative of the estate of the deceased partner, respectively, received an amount in excess of the cost to him of his partnership interests and of the undistributed net income on which the income tax had been paid. There were no means of determining whether profit or loss resulted from the sale of the assets of the dissolved partnerships until the proceeds should exceed the base, calculated in accordance with the Treasury Regulations above quoted. That had not occurred in 1920, for, whereas the Commissioner found that R. B. Mellon and A. W. Mellon received $233,429.21 each from the sale of A. Overholt & Company whiskey and $46,853.73 each from the sale of West Overton Distilling Company whiskey, it is conceded that the base for computation of the tax liability arising by reason of their respective interests in A. Overholt & Company was $990,755.53 and $60,505.66 in West Overton Distilling Company. Our conclusion is that the Commissioner erred in assessing the deficiencies for 1920.

We find no grounds for applying the doctrine of either legal or equitable estoppel. There was no misrepresentation, no concealment and no reliance, all essential to an estoppel. At most there was a mutual mistake of law. The Commissioner had all the relevant facts before him. He was informed that Frick was a partner, that Frick died in 1919 and that the partnerships thereafter were in process of liquidation. The surviving partners, under a mistake of law, filed returns as a partnership rather than as liquidating trustees. The Commissioner, under a mistake of law, continued to treat the partnerships as though they had been unaffected by the death of one of the partners. The mistake of law was mutual.

It is argued that if the appellees are not liable as partners they are liable as transferees of the assets of the two companies. Inas-

much as we have concluded that there was no tax due for 1920 it seems to follow that no tax is collectible from the appellees as transferees.

We find no errors in the rulings of the District Court upon admission of evidence, nor in its findings of fact and conclusions of law. The judgments of the District Court are affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

United States Circuit Court of Appeals for the Third Circuit

No. 6151. October Term, 1936

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

JENNIE KING MELLON ET AL., EXECUTORS OF THE ESTATE OF R. B. MELLON, DECEASED, APPELLEES

On appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, March 15, 1937.

J. W. THOMPSON, *Circuit Judge.*

[Endorsements:] Order Affirming Judgment. Received & Filed Mar. 15, 1037. Wm. P. Rowland, Clerk.

United States Circuit Court of Appeals for the Third Circuit

No. 6152. October Term, 1936

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

A. W. MELLON, APPELLEE

On appeal from the District Court of the United States for the Western District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, March 15, 1937.

J. W. THOMPSON, *Circuit Judge.*

[Endorsements]: Order Affirming Judgment. Received & Filed Mar. 15, 1937. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, Third Judicial Circuit, sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record, Vol. IV, and proceedings in this Court in the cases of D. B. Heiner, ind., and as former Collector vs. Jennie King Mellon et al., Exrs. Est. R. B. Mellon, Deceased, No. 6151; D. B. Heiner, ind., and as Former Collector, vs. A. W. Mellon, No. 6152, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of June, in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the United States the one hundred and sixty-first.

[SEAL]

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

714 Supreme Court of the United States

No. 144 — October Term, 1937

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Stone took no part in the consideration and decision of this application.

Mr. Justice Black took no part in the consideration and decision of this application.

715 Supreme Court of the United States

No. 145—October Term, 1937

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Stone took no part in the consideration and decision of this application.

Mr. Justice Black took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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152015—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 144

D. B. HEINER, INDIVIDU LLY AND AS FORMER COLLECTOR OF INTERNAL R VENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

A. W. MELLON

No. 145

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, AND THE UNION TRUST COMPANY OF PITTSBURGH, EXECUTORS OF THE ESTATE OF R. B. MELLON, DECEASED

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of D. B. Heiner, former Collector of Internal Revenue for the Twenty-Third District of Pennsylvania, prays that writs of certiorari issue to review the judgments

of the Circuit Court of Appeals for the Third Circuit, entered in the above causes on March 15, 1937, affirming the judgments of the District Court of the United States for the Western District of Pennsylvania.

OPINIONS BELOW

The opinion of the District Court (R. 148) in the case of *Heiner* v. *A. W. Mellon* is reported in 14 F. Supp. 424. The opinion of the District Court (R. 163) in the case of *Heiner* v. *Jennie King Mellon et al.* is unreported but is identical, except for names and amounts, with the opinion in the former case. The cases were consolidated for appeal and the opinion of the Circuit Court of Appeals (R. 709) is reported in 89 F. (2d) 141.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 15, 1937 (R. 712–713). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether partnership earnings continued to be taxable annually after the death of a partner.

2. In the alternative, whether such earnings are annually reportable by and taxable to the surviving partners as fiduciaries of trust estates pending final termination of partnership affairs. If so, whether the application of *Stone* v. *White,* decided

by this Court on May 24, 1937, does not defeat recovery.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 25–32.

STATEMENT

These actions were separately instituted by respondents A. W. Mellon and R. B. Mellon (R. 1, 3) for the refund of individual income tax deficiencies assessed and paid for the calendar year 1920, upon net earnings of two partnerships dissolved by the death of a partner. Juries were waived and the cases were consolidated and tried before Judge Gibson, at Pittsburgh, October 29–31, 1934 (R. 318). Special findings of fact (R. 148–155, 163–169) and conclusions of law (R. 155, 169–170) were entered by the court and judgments were rendered thereon in favor of respondents for $202,502.22 and $187,787.17, respectively, with interest (R. 2, 4). Except for amounts, the facts are the same in each case. The special findings, as supplemented by uncontradicted evidence, are as follows:

On December 12, 1918, respondents and H. C. Frick entered into two separate partnership agreements (R. 15–19) for the sole purpose of continuing the liquidation of the two corporations, A. Overholt & Co. and West Overton Distilling Company (R. 351d, 354, 365) which existed for many years as whiskey distilleries, and whose entire capital stock was owned by respondents and Frick in

one-third interests. The agreements provided that in case of dissolution by death the surviving partners "shall have full power and authority to appoint" a "liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable" (R. 17, 19).

On January 1, 1919, the corporate assets, which included large whiskey inventories in bonded warehouses, were conveyed to the respective partnerships (R. 17, 18, 156) whose businesses consisted primarily of the storage, bottling, casing, and sale of the whiskey inventories (R. 351a, 354–355). The District Court found (Fdg. 11, R. 151, 166) that "The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting."[1]

On December 2, 1919, Frick died (R. 151), but until January 31, 1921, the partnership businesses were continued and carried on in exactly the same manner as prior to his death, without any change whatsoever with respect to the liquidation businesses for which the partnerships were formed, or with respect to their places of business, policies, management, bank accounts, bookkeeping, or otherwise (R. 366–367). Their operations in 1920 were

[1] The books and records of both companies during 1920 and prior thereto were actually kept on the accrual basis (R. 511, 351e, 351g, 352b, 448d, 450e, 448c, 450b–450d); counsel for respondents so admitted (R. 511) and the District Court expressly so states in its opinion (R. 159, 173).

exactly as carried on during 1917, 1918, and 1919 by the predecessor corporations and the partnerships prior to Frick's death, except that in 1920 it was necessary to obtain permission from the Federal Government to withdraw whiskey from the bonded warehouses and, upon withdrawal, it had to be bottled for the purchaser, which was not true prior to 1920 (R. 367, 354).

R. B. Mellon received $5,000 annually for his services as "managing partner", both prior to and during 1920 (R. 351h, 353). Dewalt J. Hicks was treasurer of A. Overholt & Co. until January 31, 1921, and signed all checks and was overseer of both companies (R. 353, 357).

On January 31, 1921, Messrs. Mellon, as surviving partners of each company, entered into trust indentures (R. 19–32) with the Union Trust Company of Pittsburgh, pursuant to the authority vested in them by the partnership agreement to appoint a liquidating agent, whereby all remaining real and personal assets were sold and transferred to the Trust Company which was vested with full legal title thereto and power to "carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property * * *" (R. 23, 29). The indentures were recorded with the Land Records and United States Patent Office, the assets including trade-marks (R. 20–21, 25, 27, 31).

During 1920, A. Overholt & Co. realized a net income of $845,339.86 and West Overton Distilling Company $158,442.84 in the ordinary course of business, derived chiefly from whiskey sales from the aforesaid inventories (R. 115–116, 126–127, 396).

During 1920, A. W. Mellon and R. B. Mellon withdrew from A. Overholt & Co. the aggregate sum of $900,000 which was debited to bills receivable and credited to cash. Between January 3 and January 21, 1920, R. B. Mellon restored $150,000 on account of previous withdrawals during 1918 and 1919 (R. 593). The bills receivable account described all these withdrawals as "loans" (R. 592a, 594). On February 10, 1921, respondents and the Frick estate withdrew $400,000 each, or $1,200,000 in cash (R. 597). These and further cash withdrawals by the three interests from A. Overholt & Co. between Frick's death and August 18, 1925, aggregated $2,480,000 (R. 592a), of which $2,130,000 was never returned by respondents and the Frick estate, except that the bills receivable account shows final offsetting and closing bookkeeping entries dated December 31, 1925, and February 11, 1926 (R. 592a), after completion in 1925 of the liquidation of all assets of A. Overholt & Co. by the Union Trust Company of Pittsburgh, as trustee (R. 349, 350).[2]

[2] However, the District Court found (Fdg. 15, R. 152, 167) that the Mellons, "while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, in-

All assets of West Overton Distilling Company on hand January 31, 1921, were sold by the Trust Company, as trustee, by August 31, 1925 (R. 490d). All remaining moneys or assets of both companies were distributed prior to December 31, 1925, and each third interest received total distributions in excess of $551,914.70 from A. Overholt & Co. and in excess of $66,673.42 from West Overton Distilling Company (R. 130, 131, 143, 144, 485b, 486b).

On March 15, 1921, the Mellons filed separate individual returns for the calendar year 1920 (R. 404a–404c, 406a–406c); also separate returns, on official partnership forms, in the name of A. Overholt & Co. and West Overton Distilling Company, for 1920, each sworn to by R. B. Mellon as "Member of partnership" (R. 351, 352). The returns represented the companies as partnerships, set forth R. B. and A. W. Mellon and the Frick estate as "Members of partnership", each with a one-third "Interest in partnership", and stated that there was distributable and taxable to each $48,350.74 from A. Overholt & Co. and $5,960.55 to each from West Overton Distilling Company derived from storage, bottling, and casing operations; the sale of barrels, interest, and rental (R. 351, 352).

No fiduciary return was ever filed or caused to be filed for 1920, by respondents or anyone else as liquidating agents, liquidating trustees, or other-

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cluding cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash."

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wise, with respect to the income of either company (R. 122, 135, 392).

The partnership return of A. Overholt & Co. (R. 351d) disclosed a net profit on whiskey sales during 1920 of $646,327.63, which was not included in the distributable net income shown on the face of the return; neither did the West Overton Distilling Company partnership return include in net income the whiskey profits realized by it during 1920.

The Revenue Agent and Commissioner, in examining the partnership returns, accepted the partnership basis for the reporting of 1920 income but increased the incomes reported as distributable by adding the whiskey profits thereto (R. 387, 388), thus determining A. Overholt & Company's 1920 net income to be $845,339.86, distributable one-third each to the Mellons and the Frick estate (R. 387). The West Overton Distilling Company's 1920 net income was, likewise, increased to $158,442.84 distributable one-third each to the Mellons and the Frick estate (R. 388).

In accordance with the partnership income adjustments, the Commissioner increased the distributable one-third shares of A. W. and R. B. Mellon in their individual returns for 1920 to $281,779.95 each from A. Overholt & Co. and $52,814.28 each from West Overton Distilling Company (R. 327, 340), they having reported their distributable shares from the two companies at $48,350.74 and $5,960.55, respectively (R. 404a, 406a).

Separate returns for 1921 to 1925, inclusive, were made by the Union Trust Company, describing itself as liquidating agent for each company.

On December 20, 1922, the Commissioner sent letters to the Mellons showing individual tax deficiencies for 1920 (R. 433, 438). On January 19 and January 20, 1923, the Mellons filed protests thereto, asserting solely that the Commissioner erred in reducing the March 1, 1913, value of the good will of A. Overholt & Co. and in failing to allow the value claimed for good will (R. 452a–452n, 453–455). The addition of whiskey profits to distributive partnership shares was not questioned.

On December 16, 1926, after re-auditing the individual returns and considering the Revenue Agent's report of November 8, 1921, and the protests in connection therewith, the Commissioner separately advised the Mellons by letters that additional individual taxes were shown to be due for 1920, and that a hearing would be afforded (R. 421–432).

On January 31, 1927, the Mellons filed further protests directed to the Commissioner's findings in letters of December 16, 1926. The protests questioned only the refusal to allow as deductions certain donations, items of good will, trade-marks, etc., in connection with A. Overholt & Co., a corporation (R. 457–462). Supporting briefs were filed, simply enlarging upon deductibility of the donations. No suggestion or assertion was made

that the partnerships should be treated in any other manner than as partnerships for 1920 tax purposes (R. 463–472).

On February 21, 1927, sixty-day letters were sent to A. W. and R. B. Mellon, showing deficiencies in their individual 1920 income taxes of $190,419.70 and $175,529.70, respectively (R. 411–419). On February 21, 1927, A. W. Mellon executed a waiver (R. 474) of his right to file a petition with the Board of Tax Appeals and consented to immediate assessment and collection of the deficiency which, with interest of $12,082.52, was assessed on March 19, 1927 (R. 474), and paid April 1, 1927.[3]

On May 5, 1927, the deficiency, with interest of $12,527.47, was assessed against R. B. Mellon (R. 474), he having filed no petition with the Board and, upon notice, the assessment was paid May 19, 1927.

On May 19, 1929, the Mellons filed separate claims for the refund of $194,160.75 and $187,787.17, respectively, for 1920, each claim containing identical grounds (R. 349–349b, 350–350b).

By letters of April 16, 1932, the Commissioner advised respondents their claims would be rejected for the reason that operating incomes of the two companies in 1920 were reportable for tax purposes for that year (R. 475–478). Respond-

[3] The District Court found (Fdg. 7, R. 150) that A. W. Mellon paid the assessment "under written protest and for the purpose of avoiding additional interest, penalties and seizures."

ents requested and were given hearings on October 12, 1932, and submitted a joint brief in connection therewith on November 22, 1932 (R. 572a). Their brief abandoned the grounds relied upon in the refund claims and asserted for the first time that the partnership incomes should have been treated in 1920 as the income of taxable trusts for which both the Mellons were taxable as liquidating trustees and not individually as to distributive partnership shares (R. 572a–572h).

If these partnerships were taxable trusts during 1920, tax liabilities of $551,914.70 (R. 393–394) and $66,673.42 (R. 394–395) were admittedly incurred by A. W. and R. B. Mellon, as trustees, with respect to the 1920 net incomes of A. Overholt & Co. and West Overton Distilling Company, respectively, but the Commissioner and the United States were precluded by limitations from assessing and collecting such tax liabilities for 1920, when the Mellons first asserted they were taxable as liquidating trustees (fiduciaries) in their brief filed November 22, 1932, unless it be held that the failure to file fiduciary returns shall be considered to be a failure to file any return at all, notwithstanding the filing of partnership returns.

On October 24, 1933, the statements of claim were filed (R. 6, 33). On December 1, 1933, R. B. Mellon died and on March 21, 1934, his executors were duly substituted (R. 60, 61).

By letters of February 27, 1934, the Commissioner advised respondents that their proportion-

ate shares of operating profits of the two companies were "properly reportable on your 1920 return" and that "accordingly, the claim will be disallowed" (R. 401–402, 480–481). Both claims were rejected April 6, 1934 (R. 402–403, 479).

Claims for refund were also filed by each of the Mellons for 1925, and are now pending before the Commissioner for his decision thereon (R. 508, 510). These claims seek a refund for 1925 with respect to inclusion by the Commissioner in their individual incomes of all operating profits and losses for the years 1920 to 1925 of the two companies. The claims allege they were filed as a matter of protection against the running of the statute of limitations for 1925, if it be finally determined that the Commissioner was wrong as to 1925 and right as to 1920 (R. 508c, 510c). These claims state that since filing the 1920 claims, respondents received letters from the Commissioner advising that he "had erroneously included in taxable income in the year 1925, the operating profits and losses of said liquidating agent during the period of liquidation." The 1925 claims have not yet been finally acted upon because of these actions (R. 512).

The statements of claim are based on the contention that the amounts of $281,779.95 and $52,-814.28, consisting of profits on whiskey sales during 1920 by A. Overholt & Co. and West Overton Distilling Company, respectively, were erroneously included in each of the Mellons' 1920 individual

incomes as taxable, for the reason that the partnerships were in liquidation and such amounts, being liquidating profits, were not reportable or taxable until completion of liquidation and distribution in 1925 (R. 14); that until the cost values of the partnerships as of December 2, 1919, were fully recovered, their individual distributive shares in partnership profits were not taxable (R. 11) and that such cost basis was not exceeded until 1925; that the Mellons were liquidating trusteees for the partnerships during 1920 (R. 9), that the "liquidating profits" for 1920 were included by the Commissioner in A. W. and R. B. Mellon's individual incomes for 1925, and that a tax has been collected on the same income for each of those years (R. 14).

The Government contended in the courts below, among other things, that the amounts involved represent taxable distributive shares of the operating incomes and profits of the partnerships for 1920. It argued in the alternative that if the respondents were correct in their position that fiduciary, instead of partnership, returns should have been filed for the partnerships for 1920, the tax properly payable by the respondents as fiduciaries would exceed that actually paid by the respondents, and that therefore the amounts collected from the respondents were justly owing to the United States.

The trial judge held that the return was properly made on a partnership basis, but that the gain from the sale of whiskey in 1920 was not taxable as

income in that year because the whiskey had been converted by the death of the deceased partner and dissolution of the partnerships from stock in trade to "capital assets." The Circuit Court of Appeals affirmed the judgments of the trial court, holding, however, that "The surviving partners, under a mistake of law, filed returns as a partnership rather than as liquidating trustees."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the 1920 net incomes, including profits on whiskey sales, of the co-partnerships of A. Overholt & Co. and West Overton Distilling Company, were reportable under Section 224 of the Revenue Act of 1918, on the partnership basis, and taxable under Section 218 of the Act.

2. In failing to reverse the judgments because not supported by the special findings.

3. In failing to reverse the determination of the District Court that in 1920 liquidation of the partnerships was undertaken.

4. After deciding that the surviving partners should have filed returns as liquidating trustees instead of as partnerships, in failing to hold that the surviving partners were taxable as fiduciaries under the Revenue Act of 1918, and in not holding that the trial court should have made findings with respect to the 1920 fiduciary tax liabilities of the surviving partners for the purpose of determining whether the Government has been unjustly en-

riched by reason of the payment of the taxes in question in the present cases.

5. In affirming the judgments of the District Court.

REASONS FOR GRANTING THE WRITS

1. The decision of the court below is in conflict in principle with the decision of the Circuit Court of Appeals for the First Circuit in *Earle* v. *Commissioner,* 38 F. (2d) 965. In that case a partnership, formed January 1, 1923, was dissolved July 1, 1923, by death of one of three partners. On September 14, 1923, the partnership was wound up by conveyance of the partnership interests to a corporation in exchange for stock. The partnership made a net profit of $70,793.37 between January 1, 1923, and dissolution on July 1, 1923. Its assets were being used in another enterprise which was not completed until July 1924. Whether the enterprise would result in a gain or loss could not be ascertained during 1923. The partners urged (p. 967) that they "could not be taxed for the reason that the proper tax must be measured by the 'distributive share' of each partner, and that no share of the profits was 'distributive' until the balance of the assets over return of capital was ascertained." This is the contention which the lower court has here upheld. In rejecting that contention in the *Earle* case, *supra,* the court held (pp. 967–968):

> If the word "distributive" were to be limited to the share each partner receives from

> actual distribution of profits, either from a going concern or upon dissolution of the partnership, the words of the statute "whether distributed or not" become meaningless. Each partner has a potential right to his share of undivided profits. Plainly, the word "distributive" is used in the sense of "proportionate." It is the partner's proportionate share of the net income of the partnership gained during the taxing period that is taxable whether distributed or not. Losses suffered during the same period are allowed as deductions from partnership gross income in arriving at net profits.
>
> * * * * *
>
> Any contention that net income for the taxable year 1923 would be wiped out by losses expected in future years is untenable. Income taxes are levied upon the net income for an annual accounting period. Gains in one period may not be offset by losses in another; therefore there was no deductible loss in 1923 unless it was sustained when partnership assets were exchanged for corporate stock.

The applicable provisions of the Revenue Act of 1918 are identical with the provisions of the 1921 Act under consideration in the *Earle* case, *supra*.

2. If the decision herein is allowed to stand, it will result in escape from taxation of income actually realized by the partnership during 1920, by allowing reduction thereof by any operating losses

occurring in subsequent years. The principle would also be a dangerous precedent by affording a "loophole for tax evasion."[4]

Finding 24 (R. 169) that the Commissioner has assessed and collected a tax on the same income for both 1920 and 1925, is unwarranted because the evidence shows that claims for refund were also filed by each of the Mellons for 1925, which claims are now pending before the Commissioner for his decision thereon (R. 508–510). The 1925 claims state that they were filed as a matter of protection against the running of the statute of limitations for 1925, if it be finally determined that the Commissioner was right as to 1920 and wrong as to 1925. The 1925 claims have not been finally acted upon because of the instant actions (R. 512).

The court below held that upon the death of Frick in 1919, the partnerships dissolved and by reason of such dissolution their assets changed character from stock in trade to capital assets, so that no taxable gain was realized until the surviving partners and estate of the deceased partner actually received amounts in excess of the cost values to each of them of their partnership interests as of Frick's death, and of the undistributed net income on which a tax had been paid; that there were no means of determining whether profit or loss resulted from the sale of the assets, including

[4] See Vol. 3, 1936 C. C. H., p. 6640, where the phrase is used in discussing the present decision.

whiskey inventories, until the proceeds should exceed such bases. There is no statute or provision of law which supports such holding.

Article 1570 of Regulations 45, cited and relied upon below, has never been construed or applied in the manner attempted. Article 1570 deals with the taxability of a surviving partner who has actually received a liquidating dividend, as distinguished from his distributive share in annual earnings during winding up of partnership affairs. The article has no relation to taxability to individual partners, according to their distributive shares, whether distributed or not, of annual gains upon sales of stock in trade or other operating income pending final termination of partnership affairs.

The court below failed to distinguish between the actual receipt by partners of distributions in partial or complete repayment of their individual partnership investments, and the actual receipt by the partnership of taxable annual earnings from partnership operations and the sale of inventories of merchandise held primarily for sale.

Section 224 of the Revenue Act of 1918 requires every partnership, without exception or qualification, to make a return for each taxable year, stating specifically the items of gross income, the deductions allowed, and the names and addresses of the individuals who would be entitled to share in the net income "if distributed and the amount of

the distributive share of each individual." Such partnership returns were so filed by the Mellons, the Commissioner merely increasing their distributable net incomes by the addition of whiskey profits.

The District Court, in its opinion (R. 176), quoted the following applicable provisions of the Uniform Partnership Act of Pennsylvania (identical with the common law):

> On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.
>
> Sec. 30, Act of March 26, 1915 (P. L. 18).
>
> Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.
>
> Sec. 33, Act of 1915.

Thereupon, the District Court stated (R. 176):

> In addition to the quoted provisions of the Uniform Partnership Act of Pennsylvania, which provide for the continuance of the business of the partnership for the limited purpose stated therein, *a continuance of the partnership after the death of a partner was contemplated by the partnership agreements, which gave surviving partners the right to appoint a liquidating agent.* As stated, these questions are moot, in view of the finding that the gains of 1920 did not constitute income from the sale of a stock in

> trade, but were proceeds from the sale of capital assets which had not, in that year, equaled the amount of the cost bases to the former partners; and the further finding that such gains, in the hands of the surviving partners in trust for the Estate of H. C. Frick, as well as for themselves, were not distributive in 1920. [Italics supplied.]

The District Court recognized that the partnerships continued in existence in 1920, but did not consider it important that, under applicable partnership law and the partnership agreements, the partnerships did not terminate upon Frick's death. But the Circuit Court of Appeals predicated its decision upon the fact of dissolution by death saying that thereupon no gain was realized until the amounts received by the several interests exceeded the cost to them of their respective interests. However, the District Court's findings are incomplete. It failed to find what was the cost basis of each of the Mellons, or the date as of which such cost basis shall be fixed and what, if anything, had been recovered by each on account thereof prior to 1920, as well as during that year, all being indispensable findings, if the court's legal conclusions be held correct. Cf. *United States* v. *Esnault-Pelterie,* 299 U. S. 201.

The statement of the Circuit Court of Appeals (R. 711) that such cost bases were conceded to be $990,755.53 and $60,505.66, respectively, and that it is unquestioned that they were greater than the proceeds of whiskey sales in 1920, is inaccurate.

No such concession was made, nor does the record so show. The District Court made no such finding,[5] nor did it find what, if anything, was realized between Frick's death and January 1, 1920. There were also other operating incomes than that from whiskey.

It follows that the findings on their face fail to support the judgments and that the decision is untenable.

3. If the findings that the respondents were liquidating trustees (Fdg. 10, R. 151) and that they treated the assets of the partnerships as trust properties (Fdg. 15, R. 152) during 1920 be held correct, it follows that the decision below is in direct conflict with and contrary to the holding of this Court in *Stone* v. *White,* decided May 24, 1937, No. 202, for the reason that the respondents were then taxable as fiduciaries of trust estates within the definition of Section 200 of the Revenue Act of 1918, under Sections 210 and 211 by virtue of Sections 219 (a) and 225 of that Act.

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[5] The District Court found (Fdg. 23, R. 154–155, 169) that "The sum received from the sale of whiskey certificates * * * in 1920, and prior thereto during the existence of the partnerships, was less in amount than the cost of the assets of said companies to the partners, * * *." This conclusion is not supported by any findings of governing data for determination of cost basis, of amount of cost or recoverable basis in dollars or of the amounts received by the partnerships from other operations than sales of whiskey inventories. The A. Overholt & Co. 1920 return (R. 351f) shows the receipt of $165,868.40 as "Gross Income From Operations Other Than Manufacturing."

The respondents, in their brief filed in support of their claims (R. 572a–572h), asserted that the partnership incomes should have been treated in 1920 as the income of taxable trusts for which both the respondents were taxable as liquidating trustees and not individually as to their distributive partnership shares.

On the basis of the partnership incomes determined by the Commissioner for 1920, tax liabilities of $551,914.70 (R. 393–394) and $66,673.42 (R. 394–395) were incurred by A. W. and R. B. Mellon, as trustees, with respect to the 1920 incomes of A. Overholt & Co. and West Overton Distilling Company, respectively, and it is admitted (R. 398) that the Commissioner and the United States were precluded by limitations from assessing and collecting such tax liabilities for 1920, when the Mellons first asserted they were taxable as liquidating trustees (fiduciaries) in their brief (R. 572a–572h) filed November 22, 1932, and in their claims for refund departing from the partnership basis of reporting and taxing their incomes. In any event, petitioner was entitled to have his equitable defenses ruled upon under the principles outlined by this Court in *Stone* v. *White, supra.*

The applicability of *Stone* v. *White, supra,* is obvious because the Mellons were not only the "apparent" but "real" taxpayers, being surviving partners, fiduciaries, transferees, ultimate beneficiaries, and distributees respecting partnership assets in

amounts admittedly in excess of the fiduciary tax liabilities. Had the Mellons asserted prior to the running of the statute of limitations that they were taxable fiduciaries, the Commissioner could have made a transferee assessment under Section 280 of the Revenue Act of 1926, which was applicable to tax liabilities imposed by all prior Revenue Acts and transfers prior to its enactment. *Phillips* v. *Commissioner,* 283 U. S. 589.

It is patent that the Circuit Court of Appeals applied the same views to petitioner's equitable defenses herein as it did in the case of *United States* v. *Arnold,* 89 F. (2d) 246 (C. C. A. 3d), decided February 4, 1937, wherein it said (p. 247):

> We do not see that a mistake of judgment or any cause or reason for failure to tax one affects the legal rights of others.

This Court granted certiorari in *Stone* v. *White, supra,* because of the conflict between it and the *Arnold* case.

A further indication of such view of the court below is the conclusion in its opinion that the surviving partners under a mistake of law erroneously filed a partnership return and that the Commissioner under a similar mistake of law erroneously accepted such return, thus rejecting the equitable defense just as in the *Arnold* case. The instant decision was rendered approximately five weeks after rendition of the *Arnold* opinion.

Because of the importance of the questions involved and the opportunity created by the decision

for the evasion of taxes respecting the income of partnerships and the probable conflict of decisions, it is respectfully submitted that this petition for writs of certiorari should be granted.

STANLEY REED,
Solicitor General.

JUNE 1937.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive

share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

* * * * *

(d) The net income of the partnership shall be computed in the same manner and on the same basis as provided in section 212, except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

* * * * *

SEC. 224. That every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

SEC. 200. That when used in this title—

* * * * *

The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any

fiduciary capacity for any person, trust or estate;

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration of settlement of estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *

SEC. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a nonresident alien, stating specifically the

items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals.

TREASURY REGULATIONS 45:

ART. 321. *Partnerships.*—Partnerships as such are not subject to taxation under the statute, but are required to make returns of income. See section 224 of the statute and articles 411 and 412. Individuals carrying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnerships, whether distributed or not, and are required to include such distributive shares in their returns. The net income of a partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted. See section 212 and articles 21–26. As to the excess profits tax on partnerships with fiscal years ending in 1918 see section 335 (c).

ART. 322. *Distributive shares of partners.*—The distributive share of the net income of a partnership which a partner is required to include in his return is his pro-

portionate share of the net income of the partnership, either (a) for the taxable year upon the basis of which the partner's net income is computed, or (b), if the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed. Amounts earned and distributed to a partner by a partnership after the end of its taxable year and before the end of his corresponding taxable year should be accounted for both by the partnership and by the partner in their returns for their next succeeding taxable year.

ART. 411. *Partnership returns.*—Every partnership must make a return of income, regardless of the amount of its net income. The return shall be on form 1065 (revised) and shall be sworn to by one of the partners. Such return shall be made for the taxable year of the partnership, that is, for its annual accounting period (fiscal year or calendar year as the case may be), irrespective of the taxable years of the partners. See section 218 of the statute and articles 321–327. If the partnership makes any change in its accounting period, it shall make its return in accordance with the provisions of section 226 and article 431. See also article 424.

ART. 412. *Contents of partnership return.*—The return of a partnership shall state specifically (a) the items of its gross income enumerated in section 213 of the statute; (b) the deductions enumerated in section 214, other than the deduction provided in paragraph (11) of subdivision (a) of that section; (c) the amounts specified in subdi-

visions (a) and (b) of section 216 received by the partnership; (d) the amount of any income, war profits and excess profits taxes of the partnership paid during the taxable year to a foreign country or to any possession of the United States, and the amount of any such taxes accrued but not paid during the taxable year; (e) the names and addresses of the individuals who would be entitled to share in the net income of the partnership if distributed; (f) the amount of the distributive share of such net income of each such individual; and (g) such other facts as are required by form 1065 (revised). See also sections 222 and 227 and articles 381–385 and 441–448.

ART. 342. *Estates and trusts taxed to fiduciary.*—In the case of (a) estates of decedents before final settlement and of (b) trusts, whether created by will or deed, for accumulation of income, whether for unascertained persons or persons with contingent interests or otherwise, the income is taxed to the fiduciary as to any single individual, except that from the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary. * * *

ART. 421. *Fiduciary returns.*—Every fiduciary, or at least one of joint fiduciaries, must make a return of income (a) for the individual whose income is in his charge, if the net income of such individual is $2,000 or over if married and living with husband or wife or is $1,000 or over in other cases, or (b) for the estate or trust for which he acts, if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a nonresident alien. The return in case (a) and also in case (b) if the tax is payable by the fiduciary shall

be on form 1040 (revised), except that it may be on short form 1040A (revised) where the net income does not exceed $5,000. The return shall be on form 1041 (revised) in case (b) if the tax is payable by the beneficiaries. In such a case the fiduciary shall include in the return a statement of each beneficiary's distributive share of the net income, whether or not distributed before the close of the taxable year for which the return is made. See section 219 of the statute and articles 341–347. If the net income of a decedent from the beginning of the taxable year to the date of his death was $1,000 or more, if unmarried, or $2,000 or more, if married, the executor or administrator shall make a return for such decedent. See article 305.

ART. 1521. *Fiduciary.*—"Fiduciary" is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators, and a fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another as in the case of receivers. A committee of the property of an incompetent person is a fiduciary. See sections 219 and 225 of the statute and articles 341–344 and 421–425.

ART. 1570. *Readjustment of partnership interests.*

When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such

cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid. If, however, the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received on distribution. See article 1566. Whenever a new partner is admitted to a partnership, or any existing partnership is reorganized, the facts as to such change or reorganization should be fully set forth in the next return of income, in order that the Commissioner may determine whether any gain or loss has been realized by any partner. See also article 1563.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 144

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

PAUL MELLON, DAVID K. E. BRUCE, AND DONALD D. SHEPARD, EXECUTORS OF THE ESTATE OF A. W. MELLON, DECEASED

No. 145

D. B. HEINER, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, AND THE UNION TRUST COMPANY OF PITTSBURGH, EXECUTORS OF THE ESTATE OF R. B. MELLON, DECEASED

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court in Case No. 144 (R. 148–162) is reported in 14 F. Supp. 424. The opinion of the District Court in Case No. 145 (R. 163–176) is unreported, but is identical with that in Case No. 144 except for names and amounts. The cases were consolidated for appeal and the opinion of the Circuit Court of Appeals (R. 709–712) is reported in 89 F. (2d) 141.

JURISDICTION

The judgments of the Circuit Court of Appeals, affirming the decisions of the District Court, were entered March 15, 1937 (R. 712–713). The petition for writs of certiorari was filed June 15, 1937, and was granted October 11, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the surviving partners are taxable upon their distributive shares of the annual partnership earnings after the death of a partner.

2. In the alternative, whether such earnings are annually reportable by and taxable to the surviving partners as fiduciaries of trust estates pending final termination of partnership affairs, and, if so, whether the application of *Stone* v. *White,* 301 U. S. 532, does not defeat recovery of refunds.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved will be found in the Appendix, *infra,* pp. 94–103.

STATEMENT

These actions were separately instituted against the Collector of Internal Revenue, D. B. Heiner, by A. W. Mellon and R. B. Mellon (R. 6, 33), for the refund of additional assessments of individual income taxes paid for the year 1920 upon the net earnings of two partnerships dissolved by the death of a partner in 1919 (R. 6–33, 33–59). Jennie King Mellon *et al.,* executors of the estate of R. B. Mellon, were substituted as plaintiffs in his suit (R. 61). Juries were waived, the cases were consolidated for trial (R. 317–318), and the District Court made findings of fact and conclusions of law which are identical in the two cases, except as to names and amounts. The special findings, as supplemented by uncontradicted evidence, may be stated as follows:

On December 12, 1918, A. W. Mellon, R. B. Mellon, and H. C. Frick formed two partnerships, A. Overholt & Company and West Overton Distilling Company, to take over the assets of two corporations of the same names, which had operated whiskey distilleries for many years and the entire capital stock of which was owned by the Mellons and Frick in one-third interests (R. 15–16, 17–18, 351 d, 353–354). Each partnership agreement re-

cited that the business was formed for the purpose of manufacturing, distilling, and selling spiritous liquors (R. 16, 18); but the uncontradicted evidence shows that they were organized for the sole purpose of liquidating the two corporations which had ceased distilling operations (R. 351 d, 353–354, 361–362, 365); and both courts below so stated in their opinions (R. 156, 710).

In January 1919 the corporate assets, which included large whiskey inventories in bonded warehouses, were transferred to the two partnerships (R. 16, 18), and their businesses consisted primarily of the storage, bottling, casing, and sale of the stock of whiskey thus acquired (R. 351 a, 354–355). No new stock was to be manufactured or purchased (R. 353–354, 710).

Each partnership agreement provided that in the case of dissolution by the death of any partner the surviving partners should have "full power and authority" to appoint a "liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable" (R. 17, 19).

Frick died on December 2, 1919 (R. 151). The District Court found that immediately after the dissolution of the partnerships by Frick's death, the surviving partners began the liquidation of the two partnerships, and that between that time and January 31, 1921, they acted with respect to the assets and businesses of the two former partner-

ships as liquidating trustees (R. 151). The statement that the surviving partners acted as liquidating trustees is a conclusion of law, and the finding that they immediately began liquidation of the two partnerships is contrary to the evidence,[1] if by that statement the court meant that the character of the activities changed during 1920 from what it was during 1917, 1918, and 1919. The respondents' own witness Hicks testified that at least until January 31, 1921, the partnership businesses were continued and carried on in exactly the same manner as prior to Frick's death, without any change whatsoever with respect to their activities in liquidating the two corporations, for which purpose the two partnerships were formed, or with respect to their places of business, policies, management, bank accounts, bookkeeping, or otherwise (R. 354, 365–369). Their operations in 1920 were identical with those carried on during 1917, 1918, and 1919 by the predecessor corporations and the partnerships, except that in 1920 it was necessary to obtain permission from the Federal Government to withdraw whiskey from the bonded warehouses, and, upon withdrawal, to bottle it for the purchaser, which was not true prior to 1920 (R. 354, 367). R. B. Mellon received $5,000 annually for his services as "managing partner" of A. Overholt & Com-

[1] It is clear from the identity of language that the District Court adopted as its finding paragraph 11 of the Statement of Claim in each case (R. 9, 36), although this statement was denied in the Amended Affidavits of Defense (R. 66, 95–96).

pany, both prior to and during 1920 (R. 351h, 353). Hicks was treasurer of that company during 1919 and 1920 (R. 353, 366), and signed all checks; and he was overseer of both companies (R. 353, 357).

The District Court found (R. 151) that "The books and records of the liquidating trustees for said former partnerships were kept on the cash receipts and disbursements basis of accounting." As a matter of fact, the records of both partnerships during 1920 and prior thereto were actually kept on the accrual basis (R. 351d–e, 352b, 448b–g, 450c–e); counsel for the respondents so admitted (R. 511), and the District Court expressly so stated in its opinion (R. 159, 173). The two Mellons, however, kept their books and filed their returns on the cash basis (R. 149, 163–164).

During 1920, A. Overholt & Company realized a net income of $845,339.86, and West Overton Distilling Company realized $158,442.84, in the ordinary course of business, the greater part of which was derived from sales of whisky taken over from the corporations (R. 38, 101–103, 115–116, 126–127, 395–396).

On January 31, 1921, the two Mellons, as surviving partners of the two firms, entered into two trust indentures with The Union Trust Company of Pittsburgh (R. 19–25, 26–31), in the exercise of the authority given to them in the partnership agreements, to appoint a liquidating agent. Under each agreement all of the remaining assets of the particular partnership were sold and transferred

to the Trust Company, which was vested with full legal title thereto and power to "carry on and manage, as it may be permitted under the law so to do, the business of the said copartnership, with full discretion on its part to dispose of said copartnership property" (R. 23, 29). The indentures were recorded in the offices of certain County Recorders of the State of Pennsylvania and, as the assets included trade-marks, in the United States Patent Office (R. 25, 31).

The District Court found that liquidation was finally consummated and distribution made by the liquidating agent to the surviving partners and the estate of the deceased partner in the year 1925 (R. 152). The record shows that all assets of the West Overton Distilling Company on hand January 31, 1921, were sold by the Union Trust Company, as trustee, by August 31, 1925 (R. 490d), and all remaining moneys or assets of both companies were distributed on or prior to December 31, 1925 (R. 130–131, 143–144, 485b, 486). Each one-third interest received total distributions in excess of $551,914.70 from A. Overholt & Company and in excess of $66,673.42 from West Overton Distilling Company (R. 130, 131, 143, 144, 485b, 486b).

The District Court further found that "On December 2, 1919, and during said period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the said former partnerships, and no distribution of assets could have been legally made by either the said

liquidating trustees or the said liquidating agent until said debts and contingent liabilities had been released, paid, or satisfied" (R. 152).[2]

During 1920 A. W. Mellon and R. B. Mellon withdrew from A. Overholt & Company the aggregate sum of $900,000, which was debited to bills receivable and credited to cash. Between January 3 and January 21, 1920, R. B. Mellon restored $150,000 on account of withdrawals during 1918 and 1919 (R. 593). The bills receivable account described all these withdrawals as "loans" (R. 592a, 594). On February 10, 1921, the two Mellons and the Frick estate withdrew $400,000 each, or $1,200,000 in cash (R. 597). These and further cash withdrawals by the three interests from A. Overholt & Company between the date of Frick's death and August 18, 1925, aggregated $2,480,600 (R. 592a), of which $2,130,000 was never returned by the two Mellons and the Frick estate, except that the bills receivable account shows final offsetting and closing bookkeeping entries dated December 31, 1925, and February 11, 1926 (R. 592a), after completion in 1925 of the liquidation of all assets of A. Overholt & Company by the Union Trust Company of Pittsburgh, as trustee (R. 349, 350).

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[2] This finding corresponds with paragraph 15 of the Statements of Claim (R. 10, 37), which was denied in the Amended Affidavits of Defense (R. 68, 97). There was no evidence supporting this finding, though William A. Seifert testified, over the objection of Government counsel, that there were rumors of a possible floor stock tax (R. 370–373).

However, the District Court found that the Mellons, "while acting in the capacity of liquidating trustees, kept the assets of the said former partnerships, including cash, separately, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash" (R. 152, 167).[3]

The court also found that the sum received by the two companies from the sale of whiskey certificates in 1920 and prior thereto during the existence of the partnerships was less than the cost of the assets of said companies to the three partners (R. 154–155). But it failed to find what was the cost basis of each partner's investment in the partnership.

On March 15, 1921, the Mellons filed individual returns for the calendar year 1920 (R. 404a–c, 406a-c); they also filed separate returns, on official partnership forms, in the names of A. Overholt & Company and West Overton Distilling Company, for 1920, each sworn to by R. B. Mellon as "Member of partnership" (R. 351, 352). The returns represented the companies as partnerships, set forth R. B. and A. W. Mellon and the Frick estate as "Members of partnership," each with a one-third "Interest in partnership," and stated that there were distributable and taxable to each

[3] This finding is taken from the Statements of Claim (R. 10, 37). It was admitted in the Affidavits of Defense that the assets were kept separately, but not that they were treated as trust properties (R. 68, 97–98).

$48,350.74 from A. Overholt & Company and $5,960.55 from West Overton Distilling Company, derived from storage, bottling and casing operations, the sale of barrels, interest, and rentals (R. 351–351a, 351f, 351g, 352–352a).[4]

No fiduciary return was ever filed or caused to be filed for 1920 by the two Mellons or anyone else as liquidating agents, liquidating trustees, or otherwise, with respect to the income of either company (R. 122, 135, 156–157, 392–393).

The partnership return of A. Overholt & Company (R. 351d) disclosed a net profit on whiskey sales during 1920 of $646,327.63, which was not included in the distributable net income shown on the face of the return; neither did the West Overton Distilling Company partnership return (R. 352–352b) include in net income the whiskey profits realized by it during 1920 (R. 387–388).

The Revenue Agent and the Commissioner of Internal Revenue, in examining the partnership returns, accepted the partnership basis for reporting the 1920 income, but increased the income reported as distributable by adding the whiskey profits thereto, thus determining A. Overholt & Company's 1920 net income to be $845,339.86, distributable one-third each to the two Mellons and the Frick estate. The West Overton Distilling Com-

[4] The District Court also found that the two Mellons reported in 1925 as income for 1921–1925, inclusive, their distributive shares of the profits or losses of the liquidating agent for those years (R. 153–154, 168).

pany's 1920 net income was, likewise, increased to $158,442.84, distributable one-third each to the same parties. (R. 387–388.)

As to Frick's estate, the Commissioner eliminated the partnership interest from its taxable income for the period December 3 to 31, 1919, "as it is held by this office that the effect of the decedent's death serves to capitalize his interests in the respective partnerships" (R. 607). Respondents' witness testified that the same ruling was made as to income for 1924, that there was no discussion of the matter for 1920 to 1923, because there was no tax liability of the estate for those years, and that the income over the entire period was taxed to the estate in 1925 (R. 611, 612, 613).[5]

In accordance with the partnership income adjustments, the Commissioner increased the distributable partnership income of A. W. and R. B. Mellon reported in their individual returns for 1920 to $281,779.95 each from A. Overholt & Company and $52,814.28 each from West Overton Distilling

[5] On the basis of this evidence, the District Court made a finding that the Commissioner determined and settled the Federal tax liability of Frick's Estate for 1920 to 1925 "by holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis" (R. 152–153). This finding will be discussed in the argument, *infra*, p. 50 *et seq.*

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Company (R. 153, 327, 340, 387, 388), they having reported their distributable shares from the two companies at $48,350.74 and $5,960.55, respectively (R. 153, 387, 388, 404a, 406a). A separate return for 1925 was filed by the Union Trust Company, describing itself as liquidating agent for each partnership (R. 489–489d, 490–490d).

On December 20, 1922, the Commissioner sent letters to the Mellons showing individual tax deficiencies for 1920 (R. 433–438, 438–443). On January 19 and January 20, 1923, the Mellons and the two partnerships filed protests thereto, asserting solely that the Commissioner erred in reducing the March 1, 1913, value of the good will of A. Overholt & Company and in failing to allow the value claimed for good will (R. 452a–452n, 453–455). The addition of whiskey profits to distributive partnership shares was not questioned.

On December 16, 1926, after re-auditing the individual returns and considering the Revenue Agent's report of November 8, 1921, and the protests in connection therewith, the Commissioner separately advised the Mellons by letters that additional individual taxes were shown to be due for 1920, and that a hearing would be afforded (R. 421–426, 427–432).

On January 31, 1927, the Mellons filed further protests directed to the Commissioner's findings in letters of December 16, 1926. The protests questioned only the refusal to allow as deductions certain donations, items of good will, trade-marks,

etc., in connection with A. Overholt & Company, a corporation (R. 457–462). Supporting briefs were filed, simply enlarging upon the deductibility of the donations. No suggestion was then made that the partnerships should be treated in any other manner than as partnerships for 1920 tax purposes (R. 463–472).

On February 21, 1927 (the Mellons having executed waivers expiring December 31, 1927 (R. 413, 418)), sixty-day letters were sent to A. W. and R. B. Mellon, showing deficiences in their individual 1920 income taxes of $190,419.70 and $175,259.70, respectively (R. 150, 164, 411–415, 416–419). On February 21, 1927, A. W. Mellon executed a waiver (R. 474) of his right to file a petition with the Board of Tax Appeals and consented to immediate assessment and collection of the deficiency which, with interest of $12,082.52, was assessed on March 19, 1927 (R. 150, 474), and paid on April 1, 1927 (R. 150).[6]

On May 5, 1927, the deficiency of $175,259.70, with interest of $12,527.47, was assessed against R. B. Mellon (R. 164–165, 474), he having filed no petition with the Board; and, upon notice, the assessment was paid on May 19, 1927 (R. 165).[6]

On March 19, 1929, A. W. and R. B. Mellon filed separate claims for the refund of $194,160.75 and

[6] The District Court found that the Mellons paid the assessments "under written protest and for the purpose of avoiding additional interest, penalties, and seizures" (R. 150).

$187,787.17, respectively, for 1920, each claim containing identical grounds (R. 154, 169, 349–349b, 350–350b).[7] Refunds were claimed on the ground that the Commissioner had determined that the partnerships were in process of liquidation from 1919 to 1925, and that the surviving partners and the Frick Estate were taxable in 1925 when liquidation was completed, but were not taxable on any amounts received during the period of liquidation (R. 349–349b, 350–350b).

By letters of April 16, 1932, the Commissioner advised the two Mellons that their claims would be rejected for the reason that operating incomes of the two companies in 1920 were reportable for tax purposes for that year (R. 475–478). The Mellons requested and were given hearings, on October 12, 1932, and submitted a joint brief in connection therewith on November 22, 1932. Their brief abandoned the grounds relied upon in the refund claims and asserted, for the first time, that the partnership incomes should have been treated in 1920 as that of taxable trusts, of which the two Mellons were the liquidating trustees, and not as incomes on which they were taxable to the extent of their distributable shares (R. 572a–572h).

If these partnerships were taxable trusts during 1920, tax liabilities of $551,914.70 (R. 393–394) and $66,673.42 (R. 394–395) were admittedly in-

[7] The District Court's finding (R. 154) as to the amount of A. W. Mellon's claim is erroneous. It was for $194,160.75—not for $190,419.70 plus $12,082.52 interest.

curred by A. W. and R. B. Mellon, as trustees, with respect to the 1920 net incomes of A. Overholt & Company and West Overton Distilling Company, respectively.

Claims for refund were also filed by the two Mellons for 1925, and are now pending before the Commissioner for his decision thereon (R. 508–508d, 510–5)d). These claims seek a refund for 1925 with re. pect to inclusion by the Commissioner in their individual incomes of all operating profits and losses for the years 1920 to 1925 of the two companies. The claims allege they were filed as a matter of protection against the running of the statute of limitations for 1925, if it be finally determined that the Commissioner was wrong as to 1925 and right as to 1920, and state that since filing the 1920 claims, the Mellons received letters from the Commissioner advising that he "had erroneously included in taxable income in the year 1925, the operating profits and losses of said liquidating agent during the period of liquidation." (R. 508c, 510c.) The 1925 claims have not yet been finally acted upon because of the instant actions (R. 512).

Praecipes for summons were filed in these actions in 1932, and on October 24, 1933, the Statements of Claim were filed in the District Court for the Western District of Pennsylvania (R. 1, 4, 6–33, 33–59). On December 1, 1933, R. B. Mellon died, and on March 21, 1934, his executors were duly substituted as plaintiffs (R. 60, 61).

By letters of February 27, 1934, after these suits were begun, the Commissioner advised the two Mellons that their proportionate shares of operating profits of the two companies were properly reportable on their 1920 returns, and that "accordingly, the claim will be disallowed" (R. 401–402, 480–481). Both claims were rejected on April 6, 1934 (R. 154, 169, 402–403, 479).

The Statements of Claim are based on the contention that the amounts of $281,779.95 and $52,814.28, consisting of profits on whiskey sales during 1920 by A. Overholt & Company and West Overton Distilling Company, respectively, were erroneously included as taxable in each of the Mellons' 1920 individual income tax returns, for the reason that the partnerships were in liquidation and such amounts, being liquidating profits, were not reportable or taxable until completion of liquidation and distribution in 1925 (R. 14, 41); that until the cost values of the partnership interests as of December 2, 1919, were fully recovered, their individual distributive shares in partnership profits were not taxable and that such cost basis was not exceeded until 1925 (R. 11, 38–39); that the Mellons were liquidating trustees for the partnerships during 1920 (R. 9, 36); that the "liquidating profits" for 1920 were included by the Commissioner in A. W. and R. B. Mellon's individual incomes for 1925; and that a tax has been collected on the same income for each of those years (R. 14, 41).

The Government contended in the courts below, among other things, that the amounts involved represent taxable distributive shares of the operating income and profits of the partnerships for 1920. In the alternative, it argued that if the Mellons were correct in their position that fiduciary, instead of partnership, returns should have been filed for the partnerships for 1920, the tax properly payable by the Mellons as fiduciaries would exceed that actually paid by them, and that, therefore, the amounts collected from them were justly owing to the United States.

The trial judge, after finding that liquidating profits of the two partnerships had been taxed both in 1920 and in 1925 (R. 155), held that the returns were properly made on a partnership basis (R. 161–162), but that the gain from the sale of whiskey in 1920 was not taxable as income in that year because the whiskey had been converted, by the death of the deceased partner and dissolution of the partnerships, from stock-in-trade into "capital assets" (R. 155, 158–159). He did not clearly rule upon the Government's affirmative defense or make the necessary findings as to issues raised by it. Judgment was entered in favor of A. W. Mellon in the amount of $202,502.22, with interest, and in favor of the executors of R. B. Mellon's estate in the amount of $187,787.17, with interest (R. 2, 5).

The Circuit Court of Appeals affirmed the judgments of the trial court (R. 710–713), holding in addition, however, that "The surviving partners,

under a mistake of law, filed returns as a partnership rather than as liquidating trustees'' (R. 711). A. W. Mellon has died since the petition for writs of certiorari was filed, and, by order of this Court of October 18, 1937, Paul Mellon *et al.*, Executors of the Estate of A. W. Mellon, have been substituted as parties respondent in this Court, in No. 144.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that the 1920 net incomes, including profits on whiskey sales, of the co-partnerships of A. Overholt & Company and West Overton Distilling Company, were reportable under Section 224 of the Revenue Act of 1918 on the partnership basis, and taxable under Section 218 of the Act.

2. In failing to reverse the judgments because not supported by the special findings.

3. In failing to reverse the determination of the District Court that in 1920 liquidation of the partnerships was undertaken.

4. After deciding that the surviving partners should have filed returns as liquidating trustees instead of as partnerships, in failing to hold that the surviving partners were taxable as fiduciaries under the Revenue Act of 1918, and in not holding that the trial court should have made findings with respect to the 1920 fiduciary tax liabilities of the surviving partners for the purpose of determining whether the Government has been unjustly en-

riched by reason of the payment of the taxes in question in the present cases.

5. In affirming the judgments of the District Court.

SUMMARY OF ARGUMENT

I

A. Since the partnerships, though engaged in winding up their affairs, had not completely been terminated in 1920, the partners properly paid taxes on their proportionate share of current profits, including operating income derived from the sale of the whiskey.

1. Section 218 (a) of the Revenue Act of 1918 (Appendix, *infra*, p. 95) provides that individuals carrying on business in partnership shall be liable for income tax only in their individual capacities, and that in computing the net income of each partner there shall be included his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. Section 218 (d), *infra*, provides that the net income of a partnership shall be computed in the same way as that of individuals, except that deductions for contributions to charitable organizations are not allowed; and Section 224, *infra*, requires the partnership to file a return setting forth the items of its gross income, the deductions allowed, and the distributive share of net income to which each partner is entitled.

The statute contains no express provision as to the method of reporting income from partnerships which are in process of winding up their affairs, but the absence of such a provision indicates that partnership returns are to be filed until the partnership is completely terminated. It has been so held as to a partnership terminated by agreement, and there is no reason to apply a different rule to one terminated by the death of a partner.

The fact that a partnership is engaged in winding up its affairs would not permit the partners to defer the tax upon their distributive share of partnership profits, any more than an individual engaged in winding up a business, or a corporation in process of liquidation, could defer a tax on profits currently realized.

2. In the present cases the two partnerships, of which A. W. Mellon, R. B. Mellon, and Frick were partners, were dissolved by the death of Frick on December 2, 1919, but this did not terminate the partnerships, either under Pennsylvania law or for Federal income tax purposes. They were not finally terminated until after 1920, and in that year they were engaged in precisely the same activities as they had been engaged in from the date of their organization—namely, disposing of whiskey which had been taken over from two corporations. They derived income from casing and bottling, the sale of empty barrels, and from miscellaneous sources. Under these facts the partnerships were required to file partnership returns. They had not ceased to

operate or to derive operating profits, and were still to be dealt with as partnerships for Federal tax purposes. The two Mellons, by filing partnership returns for 1920, recognized that in fact the partnerships had not been terminated.

The profits derived from the sale of whiskey in 1920 constituted income of the partnership, as did profits from any other source. The whiskey sold constituted stock-in-trade of the partnerships and was not converted into the personal capital of the two surviving partners by Frick's death.

B. The fact of the dissolution of the partnerships does not compel a different tax result.

1. Article 1570 of Regulations 45 has no application to this case; it merely relates to the method of determining the gain or loss realized by a partner when his interest in the partnership is completely terminated and he has had returned to him his capital investment, or what is left of it.

The dissolution did not convert the nature of the interest of the surviving partners in the firm into an interest in the specific assets which could then be regarded as a single unit constituting personal capital of the surviving partners. This construction of Article 1570 applies to partnerships in liquidation the same tax considerations applicable to sole proprietors, and comports with the policy adopted by the Revenue Acts, of assuring a regular flow of income to the Government through the use of regular tax periods.

2. The fact that the Commissioner has not taxed the estate of Frick on this theory is immaterial.

Surviving partners do not have the same status as the estate of a deceased partner for tax purposes. The interest of a deceased partner is capitalized by his death, and, in the absence of an agreement, neither he nor his estate has any interest in the future earnings of the partnership as such. The value of his interest at the time of his death is subject to Federal estate tax, and sums paid to the estate after his death constitute amounts paid to liquidate or to purchase his interest, hence they represent a return of capital. But that is obviously not true of the surviving partners, and no court has suggested that they could or should be treated in the same way as estates of deceased partners.

3. These conclusions are not affected in any way by the provisions of Section 219, *infra,* relating to the taxation of trusts. The Pennsylvania statutes do not provide that a partnership shall be considered terminated, or that a trust shall take its place, upon the death of a partner, even though the surviving partners are sometimes referred to in the decisions of the courts of that State as liquidating trustees. But even if the Pennsylvania law did provide for the creation of trusts in such cases, that would not alter the requirements of the Federal statutes, which have their own criteria in such matters. The statutes and regulations have never provided that partnerships in liquidation shall be treated as trust estates, and, in the absence of such provision, partnership returns are required just

as they are in the case of receivers in charge of partnerships.

C. The theory of the court below that the partnership earnings were returns of capital, even if correct, will not support a judgment for the respondents, for the reason that the District Court did not make the necessary findings as to the cost basis of the partnership interests of A. W. Mellon and R. B. Mellon, or what portion of the investment, if any, had been recovered. The Circuit Court of Appeals had no authority to make findings, but, if it had, its findings are incomplete and based upon the assumption that the Commissioner has made concessions which, in fact, have not been made.

II

If the Court should agree that the earnings of the two companies were taxable in 1920, but should hold that they were taxable to the companies as the income of trusts, nevertheless, in equity and good conscience, the respondents should not recover the amounts sought in this action.

A. Both parties below assumed that the statute of limitations would now bar an assessment against the companies as trusts, or against the respondents as transferees, and the Government presumes that this Court will now make the same assumption.

Accordingly, in equity and good conscience respondents should not be permitted to insist that the tax should have been paid by the trusts since the

Government can no longer assess the trust or its transferees.

B. The doctrine of *Stone* v. *White,* 301 U. S. 532, is applicable, and the various factors of that case are all present here.

1. Had the companies paid the tax as trusts, one-third of the actual burden would have been borne by each of the Mellons as beneficiary. Indeed, had the Commissioner acted in time he could have proceeded against the Mellons as transferees, and each of them would eventually have borne at least one-third of the tax attributable to the companies. In these circumstances, respondents should be restricted in their recovery to the amounts by which the tax paid by each Mellon exceeded one-third of the tax which should have been paid by the trust, and the Government suggests that the cause be remanded for a determination of the size of amounts.

2. In this case there was a single error, the incorrect treatment of the companies. The error was excusable, hinging upon a mooted question of law. Indeed, here the equities are stronger than in *Stone* v. *White, supra,* for in this case the mistake was at least mutual. The Mellons filed their returns on a partnership basis and continued to act on this assumption for eleven years.

3. The Government has not contrived the partnership theory as a means of reviving a stale claim. The error was initiated by the taxpayer's own returns. And the good faith of the Commissioner is further evidence by the fact that before the stat-

ute of limitations had barred assessment against the companies as trusts he took positive administrative action on the assumption that the companies were partnerships in 1920, as is disclosed by the letters sent to the Mellons December 20, 1922, and that before he was barred from assessing the Mellons as transferees he sent to them sixty-day deficiency letters.

4. No statute of limitations precludes the assertion of this equitable defense. The statutory bar to the right of action for collection against the trust applies to a set-off or counterclaim but not to a pure defense. *McEachern* v. *Rose,* No. 6, this Term, decided November 8, 1937, has no application to this case. The statutory provisions which commanded the result in that case (Revenue Act of 1928, Secs. 607, 609) were not in effect prior to 1928, and no similar provisions appeared in the earlier acts. And *McEachern* v. *Rose, supra,* has no application to a case where in an action for the recovery by one taxpayer the Commissioner offers an equitable defense predicated upon the deficiency of the same taxpayer acting in another capacity, *for the same year.*

C. The Government's affirmative defense cannot be affected by any consideration of the tax paid by the Mellons for 1925. Their tax liability for that year has not been finally determined, and careful adjustment will be made in that proceeding to compensate for the ruling of the Court in this case.

ARGUMENT

I

THE TWO PARTNERSHIPS CONTINUED TO EXIST THROUGH 1920, FOR INCOME TAX PURPOSES, AND THE TAXPAYERS WERE REQUIRED TO REPORT THEIR DISTRIBUTIVE SHARE OF THE PARTNERSHIP'S CURRENT NET INCOME FROM ALL SOURCES

A. SINCE THE PARTNERSHIPS, THOUGH ENGAGED IN WINDING UP THEIR AFFAIRS, HAD NOT BEEN COMPLETELY TERMINATED IN 1920, THE PARTNERS PROPERLY PAID TAXES ON THEIR PROPORTIONATE SHARE OF CURRENT PROFITS, INCLUDING OPERATING INCOME DERIVED BY THE FIRMS FROM THE SALE OF WHISKEY

1. A partnership must file tax returns until its affairs are absolutely terminated

Section 218 (a) of the Revenue Act of 1918 provides that individuals carrying on business in partnership shall be liable for income tax only in their individual capacity, and that in computing the net income of each there shall be included his distributive share of the net income of the partnership, whether distributed or not; Section 218 (d) provides that the net income of a partnership shall be computed in the same way as that of individuals, except that deductions for contributions to charitable organizations are not allowed; and Section 224 requires the partnership to file a return, setting forth the items of its gross income and the deductions allowed, and the amount of the distributive share of net income to which each partner is entitled. Appendix, *infra,* pp. 95, 96.

a. The statute contains no express provision as to the method of reporting income from partnerships which are in the process of winding up their business; but the absence of any specific provision on that subject, as well as the requirements that members "carrying on business in partnership" shall report their distributive shares of the partnership profits and that "every partnership" shall file a return, gives rise to a strong inference that these obligations are to be met so long as the partnership has any existence as such, and that it is only when it is completely terminated that the obligation to file partnership returns and to report income as partners ceases. This construction is reenforced by Article 424 of Regulations 45, *infra*, p. 101, requiring such continuing returns of partnerships in the hands of receivers.

b. This construction of the statute is also supported by the decision in *Rossmoore* v. *Anderson*, 1 F. Supp. 35 (S. D. N. Y.), affirmed, *per curiam*, 67 F. (2d) 1009 (C. C. A. 2d), certiorari denied, 292 U. S. 630. That case involved a partnership engaged in the accounting business in New York City. On November 1, 1920, the partners executed a dissolution agreement that no new business should be undertaken, and providing for the completion and liquidation of pending commitments. The agreement constituted one of the partners, Rossmoore, the liquidator of the business at a fixed salary, and provided that cash on hand amounting to

$70,732.92, including capital contributions, should forthwith be distributed, except for a reserve of $5,000 for expenses. On January 3, 1921, the sole assets of the firm consisted of moneys receivable for services rendered by the firm prior thereto and moneys to become due for services by reason of the completion of service contracts already made. On that date Rossmoore executed a written instrument purporting to transfer to his wife in trust for herself and children all his right, title, and interest in all profits, moneys, and other benefits to be derived from the partnership business in liquidation, exclusive of his salary as liquidator and the $5,000 reserve. The question involved was whether the taxpayer was taxable upon his share of the partnership profits for 1921. The District Court held that his share of the partnership profits constituted income taxable to him. After pointing out that under New York law a conveyance by a partner of his interest does not dissolve the partnership, does not give the assignee any interest in the firm assets as such, and does not remove from the transferring partner his income tax burden, the court considered the effect of the liquidating agreement and said (p. 36):

> Is the situation different by reason of the execution of the liquidating agreement of November 1, 1920? This agreement is referred to in the stipulation as "a dissolution agreement," and although counsel for the government appeared to contest that des-

ignation on the trial, I have no reason to doubt that the agreement actually worked a dissolution of the partnership. But even on dissolution, a partnership is deemed to continue for the purpose of winding up; and under the terms of the present agreement, the unfinished business of the partnership consisted largely of contracts upon which additional accounting services were to be performed before the amounts payable to the firm could be realized. This was necessarily so because of the extremely personal nature of the business; and the fact that it took until 1927 to complete the liquidation indicates that the "profits" in which the plaintiff had an interest were principally those to be made in the future through the personal efforts of the plaintiff and those connected with the firm rather than such as might be realized from finished business. *The agreement was in the nature of an arrangement for a continuation of the business under the plaintiff's management with a limitation on his authority to undertake new work; and I do not think it had any material effect on the tax liability of the individual partners in so far as future income from partnership business was concerned.*

* * * * *

* * * In the present case, there was a continuation of the business of the partnership, even though the dissolution agreement limited the agency of the partners and provided that no new business should be under-

> taken; so that for all practical purposes, in so far as the tax was concerned, the case was no different than if the partnership had continued as a going firm. * * * [Italics supplied.]

Subsequently, Rossmoore litigated this question again, with respect to later tax years, and the result reached in the first case was approved, *Rossmoore* v. *Commissioner,* 76 F. (2d) 520 (C. C. A. 2d). In the course of its opinion the court observed, through Judge Learned Hand (p. 521):

> The assignment made the assignee as little a member of the firm as though it had not been dissolved; it made her as little a direct owner of any interest in the firm property; it was no different from an assignment before dissolution. The opposite might indeed be true, if we were to regard the firm as wholly at an end; conceivably it might also be true, at least for tax purposes, if upon dissolution nothing remained to be done but to collect and distribute debts unconditionally due. *But this firm took seven years to liquidate, and the business continued and so did the firm;* "on dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." New York Partnership Law (Consol. Laws N. Y. c. 39) § 61. This was the common law as well. *Roby* v. *American Central Insurance Co.,* 120 N. Y. 510, 24 N. E. 808. [Italics supplied.]

It is true that in the instant cases it was the death of a partner, and not a dissolution agreement, that brought about the winding up of the partnerships; but that does not serve to distinguish these cases from the *Rossmoore* cases.

c. No one would argue that an individual who had no income from any source except his business should refrain from filing an income tax return for the reason that he was engaged in winding up his affairs and had ceased buying new stocks of goods. The same rule should apply to partnerships. The partnership is not taxed as an entity. The taxpayers are the individuals carrying on business in partnership form. The operating income of the partnership is operating income of the individuals. Accordingly, we submit that current earnings of the partnership are current earnings of the individual members, and hence that portion of each individual member's distributive share which represents profits earned during the current year is taxable income to the individual member even though the partnership may be in liquidation. See Klein, Federal Income Taxation, Par. 33.11.

However, we think the rule would be no different even if the partnerships were regarded as entities. Corporations which have been dissolved but whose existence is continued by State law for the purpose of winding up their affairs are required to file corporate returns. See Section 239 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081; *Northwest*

Utilities Securities Corp. v. *Helvering,* 67 F. (2d) 619 (C. C. A. 8th), certiorari denied, 291 U. S. 684; *First Nat. Bank of Greeley, Colo.,* v. *United States,* 86 F. (2d) 938 (C. C. A. 10th); *Smith* v. *Commissioner,* 26 B. T. A. 1178, appeal dismissed, *sub nom. Hauser* v. *Commissioner* (App. D. C.), October 31, 1933, unreported; Article 547, Regulations 45, *infra;* O. D. 821, 4 Cumulative Bulletin 278. We submit that upon like principles a partnership which is in process of liquidation but which has not ceased to exist and to derive profits, is required to file partnership returns, and that the surviving partners are required to report their shares of the distributive earnings of the partnership.

2. The affairs of these partnerships had not been terminated, in law or in fact; indeed, the firm was continuing to conduct the limited selling function for which it had been organized and was deriving operating income from the sale of whiskey, its stock in trade

It is true that in the instant cases, Frick's death dissolved the partnerships. We shall discuss below, p. 40 *et seq.*, the general effect of a dissolution upon the tax liability of a partnership and the partners. For present purposes, it is sufficient to observe that the dissolution of a partnership does not instantaneously bring to an abrupt halt its various affairs.

a. In *Rossmoore* v. *Anderson, supra,* even after dissolution by an agreement the partnership was deemed to continue for the purpose of winding up. Similarly here, the death of Frick on December

2, 1919, may have dissolved the two partnerships, but it did not terminate them. Sections 29, 30, and 31 of the Pennsylvania Uniform Partnership Act of March 26, 1915, Penna. Laws, 18, 25–26, part VI (Purdon's Penna. Statutes Annotated, Permanent Ed., Title 59, Secs. 91, 92, and 93), provide as follows:

> SEC. 29. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.
>
> SEC. 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.
>
> SEC. 31. Dissolution is caused:
>
> * * * * *
>
> (4) By the death of any partner;
>
> * * * * *

For the purpose of the winding up of its affairs, the partnership continues with title in the surviving partner or partners until final distribution. *Wood* v. *Wood,* 312 Pa. 374, 380; *Stewart* v. *Angle,* 315 Pa. 135, 139; *Froess* v. *Froess* 284 Pa. ~~Super.~~ 369, affirmed, 289 Pa. 69. See also *Elliott-Lewis Elec. Co.* v. *Hausman,* 104 Pa. Super. 322, 325. The survivors have authority to act for the partnership, both in winding up its affairs and in completing transactions already begun, but not to undertake new business. See Section 33 of Pennsylvania Uniform Partnership Act (Purdon's Penna. Stat-

utes, *supra,* Sec. 95). A survivor binds the partnership as to third persons by any act which is appropriate for winding up the partnership or completing its business (*Froess* v. *Froess, supra*); and the assets are still firm assets during this period (*Jackson* v. *Gunton,* 218 Pa. 275). (The Pennsylvania decisions are discussed in greater detail in connection with the respondents' contention that the surviving partners had the status of trustees, *infra,* p. 56.)

b. It is clear that in this case the partnership affairs had not been wound up and the partnerships had not wholly ceased to exist in 1920, within the meaning of either the Pennsylvania statute or the Federal income tax law. Whether they were terminated by the trust indentures executed by A. W. and R. B. Mellon on January 31, 1921, appointing the Union Trust Company liquidating agent to carry out the liquidation of the assets and businesses of the two partnerships (R. 47–57), or upon discharge of the Union Trust Company, as trustee, in 1925 (R. 152), is not important here.

As shown in the statement, *supra,* pp. 5, 6, not only were the partnerships not terminated in 1920 under either view, but they were continuing in the same activities in which they had been engaged during Mr. Frick's lifetime. Partnership returns (Form 1065) were filed voluntarily by the surviving partners for 1920, in which they reported their distributive shares of so much of the partnership profits as they conceded were taxable, and they re-

ported these shares in their individual returns. The return of A. Overholt & Company showed gross income in the amount of $165,868.40 (R. 351) from operations exclusive of rents and interest, and exclusive of profits from the sale of whiskey, which were not conceded to be taxable (R. 351f). On page 2 of the return (R. 351a), it was explained that the partnership was engaged in the business of "Storage of Whiskey," "Bottling for Customers," and "Sale of Purchased Whiskey from corporation of the same name." A sheet attached to the return (R. 351d) gives gross sales of whiskey in bonded warehouses, inventories, storage charges, distillery labor expense, and other operating expenses. The return of West Overton Distilling Company showed gross sales of $47,729, less cost of goods sold, $20,127.92 (R. 352–352b). As in the case of the A. Overholt & Company return, the gain derived from the sale of whiskey was not reported as part of income of the partnership, though the income thus realized was disclosed by the return (R. 157).

It should be remembered that the partnerships had originally been organized in December 1918 for a very limited purpose. They took over assets of two corporations of the same names, and while the partnership agreements recited that they were formed for the purpose of manufacturing, distilling, and selling spiritous liquors, they were not in fact engaged in any distilling business and were organized solely to continue the liquidation of the

two corporations, the stock of which had been owned in equal shares by the three partners. Partnership operations had been confined to the storage, bottling, casing, and sale of whiskey. Operations in 1920 were exactly the same as those carried on during 1917, 1918, and 1919 by the predecessor corporations and by the partnerships prior to Frick's death, except that in 1920 it was necessary to obtain permission from the Federal Government to withdraw whiskey from the bonded warehouses, and, upon withdrawal, to bottle it for the purchaser, which was not true prior to 1920. (*Supra*, p. 5.)

The testimony of the taxpayers' witness Hicks shows that there was also no change as to places of business, policies, management, bank accounts, bookkeeping, or otherwise.[8] (R. 366–367.) Hicks was treasurer of A. Overholt & Company during 1919 and 1920 (R. 366) and signed all checks, and was overseer of both companies (R. 353, 357). R. B. Mellon received $5,000 annually for his services as "Managing Partner," both prior to and during 1920 (R. 351h, 353).

Thus it is evident that in these cases the partnerships were organized for the purpose of liquidation.

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[8] The District Court found that the books and records of the liquidating trustees for the former partnerships were kept on the cash receipts and disbursements basis (R. 151, 166). This was clear error. The books and records of both companies during 1920 and prior thereto were actually kept on the accrual basis (R. 511, 351e–g, 352b, 448b, 450d). Counsel for the taxpayers so admitted (R. 511), and the District Court so stated in its opinion (R. 159). See *supra*, p. 6.

Both before and after Frick's death the liquidation consisted principally of selling whiskey. Frick's death caused no change in the nature of the business; it caused no change in the nature of the profits realized by the partnerships; and, we submit, it should cause no change in the method of accounting for those profits.

The Mellons themselves, by filing partnership returns for 1920, in effect recognized that the partnerships had not been terminated, and that their activities were being continued without substantial change, although they did not include in the net income distributable to the partners the profits derived from the sale of whiskey.

Moreover, during all of the so-called period of liquidation the two Mellons and the Frick Estate continued to make withdrawals of money from the partnerships for their own uses. From these facts, and from the division of the profits into three parts on the returns (R. 351, 352), the District Court might well have concluded that there was an implied agreement that the Frick Estate should continue as a member of the partnerships instead of finding that there was no such agreement (R. 151). But that is immaterial here. What is material is that the partnerships had not ceased to operate or to derive operating profits, although they were engaged in winding up their affairs.

c. The theory of the District Court, which conceded that partnership returns were required, but nevertheless held that the whiskey profits were not

taxable, was that the whiskey had been converted into capital assets at the time of Frick's death. But the whiskey had constituted stock-in-trade of the partnerships prior to Frick's death, and its character was not changed by anything that occurred at that time. The partnerships, which had never engaged in distilling operations, merely continued to bottle and sell the stock of liquor acquired from the two corporations of the same names.

In the case of *Roney* v. *Commissioner,* 67 F. (2d) 165 (C. C. A. 4th), certiorari denied, 290 U. S. 705, the court rejected the contention of two partners that profits derived from the sale of whiskey after the partnership had ceased manufacturing constituted a gain from the sale of capital assets, and not ordinary income derived from sales of its stock-in-trade. That case involved a partnership which was chiefly engaged in buying and selling junk, in the course of which it purchased distilleries, dismantled them, and sold the salvaged material. It purchased a distillery in Maryland and during 1920 and 1921 manufactured whiskey and stored it in warehouses to await satisfactory marketing conditions. The whiskey was not sold until 1927 and 1928, but the court held that it was nevertheless stock-in-trade. It said (pp. 166–167):

> It may be mentioned, incidentally, that the aging of whisky might be properly regarded as a part of the process of its manufacture.

The whisky in question was the stock in trade of the partnership operating as the Gwynnbrook Company, and was property proper to be included in the inventory of the partnership.

We think the case is controlled by a decision of the Supreme Court in *Renziehausen* v. *Lucas,* 280 U. S. 387, 50 S. Ct. 156, 74 L. Ed. 501.

The activities of the partnership with regard to the whisky business between the years 1922 and 1925 were continuously carried on, even though slight, and consisted in paying warehouse charges and transporting the whisky from one warehouse to another in the year 1924 and again in the year 1925, but very slight activity constitutes "doing business" when the end is profit. *Blair* v. *Wilson Syndicate Trust* (C. C. A.) 39 F. (2d) 43; *Harmar Coal Co.* v. *Heiner* (C. C. A.) 34 F. (2d) 725; *Sloan* v. *Commissioner* (C. C. A.) 63 F. (2d) 666.

In this case, as in the *Roney* case, the whiskey was stored in warehouses, aging, but it had not lost its identity as stock-in-trade. The profits derived by the partnerships from it were taxable as ordinary income, in the same manner as income derived from interest, rents, storage, bottling and casing, sales of empty barrels, and other sources. We find no authority in any statute, regulation or decision for considering the whiskey profits as returns of capital, or for holding that the whiskey

constituted personal capital of the partners to be considered as a single investment.[9] In *A. Guckenheimer & Brothers Co.* v. *Heiner* (W. D. Pa.), decided May 12, 1934, not officially reported, but found in 15 A. F. T. R. 990, the same District Court which decided these cases held that a corporation which was engaged in selling out its whiskey and retiring its stock was, nevertheless, taxable upon the profits thus realized. See also *Renziehausen* v. *Lucas*, 280 U. S. 387.

B. THE DISSOLUTION OF THE PARTNERSHIPS DOES NOT COMPEL A DIFFERENT TAX RESULT

The Court of Appeals advanced alternative grounds as to why partnership returns with respect to the profits from the sale of the whiskey were not required. Both grounds of its opinion depend on the consequences of the dissolution of the partnerships. The court held, first, that the dissolution renders applicable Article 1579 of Regulations 45, under which a partner is allowed a gain or loss upon the complete liquidation of his partnership interest, and that everything received during the period of liquidation, from whatever source, is ap-

[9] If the whiskey became a capital asset of the partnerships, as distinguished from personal capital of the partners, the gain realized from its sale would, nevertheless, be taxable as any other income under the Revenue Act of 1918. Partners are taxed currently on gains derived by the partnership from the sale of its assets. *Helvering* v. *Walbridge*, 70 F. (2d) 683 (C. C. A. 2d), certiorari denied, 293 U. S. 594; *McCreery* v. *Commissioner*, 4 B. T. A. 967; *Snead* v. *Elmore*, 59 F. (2d) 312 (C. C. A. 5th).

plied against the cost of his investment. It further held that the surviving partners should really have been treated as liquidating trustees, and filed fiduciary returns.

We have already shown that a dissolution is not equivalent to a termination of all of the affairs of a partnership, *supra*, p. 32 *et seq.* We shall now show, first, that Article 1570 does not require that taxation of current income be deferred until the partner's capital investment has been recovered on liquidation. We shall further show that the dissolution did not have the effect of requiring or authorizing the surviving partners to file returns as liquidating trustees.

1. Article 1570 of Regulations 45 does not apply to every dissolution of a partnership, but only to situations where the partner has completely severed his connection with the partnership and its assets

a. Article 1570 relates to the method of determining the gain or loss which a partner realizes when he retires from a partnership or it is dissolved. It provides that in either of such cases he realizes a gain or loss measured by the difference between the price received for his interest and its cost basis, including in such cost the amount of his share in any undistributed partnership net income on which the income tax has been paid. It does not become automatically applicable in the event of a dissolution of a partnership. It was not even referred to in *Rossmoore* v. *Anderson*, 1 F. Supp. 35 (S. D. N. Y.), affirmed *per curiam*, 67 F. (2d) 1009

(C. C. A. 2d), certiorari denied, 292 U. S. 630, or *Rossmoore* v. *Commissioner,* 76 F. (2d) 520 (C. C. A. 2d), *supra,* pp. 27–30, though that firm was deemed to have been dissolved by agreement.

The article intends that the gain or loss on the partner's investment is to be determined only when he has completely severed his connection, both with the partnership and its assets. This is clear from the further provision that if the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received on distribution. It is equally clear from the regulations that not every adjustment in partnership interests is intended to result in an immediate gain or loss to the partners, for the regulations require that when a new partner is admitted or the partnership is reorganized, the facts shall be submitted to the Commissioner to determine whether a gain or loss has been realized by any partner. Thus Article 1570 does not deal with the method of reporting income realized during the period of liquidation of a partnership. When the article is considered with Articles 321 and 411, *infra,* the inference is that partnership profits are to be reported so long as the partnership has any existence as such; that there is no conversion of partnership earnings into capital before they have been reported as distributable income taxable to the partners; and that a partner sustains a gain or loss only when his interest in the partnership and its assets is finally terminated

and his capital investment is finally returned to him in cash, or, if it is returned to him in kind, when such property is disposed of.

The dissolution of the partnership upon the death of Frick did not alter the nature of the partners' interest in the assets owned by the firm or change the whiskey into a single unit of their personal capital. No more in the case of a death than in that of a technical dissolution caused by the retirement or admission of a partner, is a partner's interest in the firm converted into a specific interest in specific assets thence to be regarded as his capital. Compare *Rossmoore* v. *Commissioner,* 76 F. (2d) 520, 521, (C. C. A. 2d), *supra,* p. 30. Much less can the dissolution serve to make subsequent earnings a return of capital. The mere fact that a partner has died and the partnership is in process of liquidation does not *ipso facto* convert what would otherwise be regarded as partnership earnings of the surviving partners into either their capital or that of the partnership.[10]

There is no basis for considering anything but the actual capital contributions of the surviving partners as their capital investments. Clearly the partnership assets are not immediately converted into their personal assets. The partnership debts are first to be paid, and the partner is entitled only to his share of what is left. *Blodgett*

[10] But of course, as explained *supra* note 9, even if the whiskey was capital of the firm, its sale would yield a profit taxable to respondents.

v. *Silberman,* 277 U. S. 1, 10–11. While a partnership is not a juristic person, for practical purposes it is regarded as the owner of its assets (*Helvering* v. *Walbridge,* 70 F. (2d) 683, 685 (C. C. A. 2d), certiorari denied, 293 U. S. 594), and this ownership is not transferred from it to the partners individually until the business is actually and finally terminated and they are distributed.

The foregoing discussion is not affected by *Wood* v. *Wood,* 312 Pa. 374. In that case, though the deceased partner had contributed twice as much as the other partner, the partnership agreement gave the latter nearly twice as large a share of the profits. The court held that the decisive date of ascertaining the value of the capital interest was the date of dissolution, not that of final distribution, and that income received after the date of dissolution should be distributed in the proportion of capital contribution. That case was not concerned with tax considerations, which cannot vary from State to State with the local law (and see *infra,* pp. 57–58). And it was concerned with income which represented merely the interest on bonds and dividends on stock owned by the firm at the time of the dissolution, not the stock-in-trade involved in this case; in the *Wood* case "nothing remained to be done but to collect and distribute debts unconditionally due," see *Rossmoore* v. *Commissioner,* 76 F. (2d) 520, 521 (C. C. A. 2d), *supra,* p. 30. Moreover, the capital contributions were examined merely for the purpose of securing

a fair interpretation of the provision in the partnership agreement with respect to a division of profits; it was thought that the special ratio should not apply after dissolution, when no enterprise can be exerted in aggressive search of gain (p. 379).

The instant case involves not the question whether a payment actually made to a partner in course of liquidation constitutes a return of capital or income, but whether current earnings of the firm are taxable to him as long as the partnership continues. We do not concede, however, that there are any circumstances where a partner may be said to have withdrawn capital and not profits, unless the partnership has paid him more than it has earned. See *Lloyd* v. *Commissioner,* 15 B. T. A. 82; and compare *Helvering* v. *Smith,* 90 F. (2d) 590 (C. C. A. 2d). In the latter case it was held that where a partner had contributed no capital to the firm, even the final dividend constituted income to him; and we think the implication was that where that was not the case, he would receive income to the extent that there were any partnership earnings his share of which had not been previously taxed to him. Article 1570, Regulations 45, *infra,* indicates that only previously taxed partnership earnings are to be regarded as capital in determining the gain or loss of the partnership upon final liquidation.

These views find support in *Earle* v. *Commissioner,* 38 F. (2d) 965 (C. C. A. 1st). That case involved a partnership organized under the Massachusetts Uniform Partnership Act; thus the

effect of the death of one of the three partners on July 1, 1923, was to dissolve the firm. Before his death the three partners had decided to form a corporation, but it was not until September 14, 1923, that stock was issued to the estate of the deceased partner and the two surviving partners and the assets of the partnership were transferred to the corporation. The partnership made a net profit of $70,793.37 between January 1, 1923, and its dissolution on July 1, 1923. Its assets were being used in the construction of a building which was not completed until July 1924, after it had been transferred to the corporation with the other assets of the partnership. The partners urged that they could not be taxed on the partnership profits for the reason that the partnership had ceased to exist; that they had no interest in its assets until after the affairs of the partnership had been wound up; and that no part of the profits became income to them until after an excess of the assets over a return of capital was ascertained. In answer to that argument the court said (pp. 967–968):

> If the word "distributive" were to be limited to the share each partner receives from actual distribution of *profits,* either from a going concern or *upon dissolution of the partnership,* the words of the statute "whether distributed or not" become meaningless. Each partner has a potential right to his share of undivided profits. Plainly, the word "distributive" is used in the sense of "proportionate." It is the partner's pro-

> portionate share of the net income of the partnership gained during the taxing period that is taxable whether distributed or not. Losses suffered during the same period are allowed as deductions from partnership gross income in arriving at net profits. Holmes, Fed. Taxes 1923. Ed. 207.
>
> * * * * *
>
> Any contention that net income for the taxable year 1923 would be wiped out by losses expected in future years is untenable. Income taxes are levied upon the net income for an annual accounting period. Gains in one period may not be offset by losses in another; therefore there was no deductible loss in 1923 unless it was sustained when partnership assets were exchanged for corporate stock. [Italics added.]

Although it does not appear that the *Earle* case actually involved any profits earned after the date of the death of the deceased partner, the language of the opinion, in answer to the contentions there made by the taxpayers, seems to have been intended to embrace such a situation.

b. This is a reasonable rule in view of the fact that in so far as possible persons doing business as partners are required to determine their net income from the partnership in the same way as in the case of a business individually owned. As previously suggested, a merchant or manufacturer operating a business as a sole proprietor would not be entitled to treat all of his earnings as capital after he had decided to go out of business and had ceased

to manufacture or purchase new stocks of goods. We can see no reason for applying a different rule to a partnership liquidation.

c. The Revenue Acts contemplate that individuals, partnerships, and corporations shall render annual returns of income and account for profits as they are earned. Such a system is in fact necessary to produce revenue regularly for the support of the Government. In *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, this Court said (pp. 364–365):

> A taxpayer may be in receipt of net income in one year and not in another. The net result of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss.
>
> The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. It is not suggested that there has

> ever been any general scheme for taxing income on any other basis. The computation of income annually as the net result of all transactions within the year was a familiar practice, and taxes upon income so arrived at were not unknown, before the Sixteenth Amendment. See *Bowers* v. *Kerbaugh-Empire Co., supra* [271 U. S. 170], p. 174; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433; *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601, 630.

The Government's construction of Article 1570, is consonant, as far as is practicable, with this policy of assuring a regular flow of income to the Government through the use of regular taxable periods. And compare *Earle* v. *Commissioner, supra,* p. 47. The decision below would defer to a single date the determination of the total tax liability of the partners for operations governing several, perhaps many, years. Individual items of income, instead of being taxed as they are earned, would be accumulated until the eventual year of distribution, when they would all be taxed at the same time. Such a result may distort the Government's tax receipts from year to year. Further, the decision below, by permitting realized income to be reduced by operating losses in subsequent years, and by deferring the date of taxation until the time when the partners decide finally to distribute their assets, may constitute a dangerous precedent affording a "loophole for tax evasion," see vol. 3, 1936 C. C. H. p. 6640.

d. The conclusion that Article 1570 did not become automatically applicable upon Frick's death is fortified by the fact that his death did not cause the slightest change in the amount and kind of business done by the two companies. They simply continued the storage, bottling, casing, and selling operations which they had previously carried on. These considerations are discussed in greater detail, *supra*, pp. 34–37. This is not a case where "upon dissolution nothing remained to be done but to collect and distribute debts unconditionally due," see *Rossmoore* v. *Commissioner*, 76 F. (2d) 520, 521 (C. C. A. 2d), *supra*, p. 30.

2. The interest of the surviving partners remains unchanged in character, though death may have capitalized the interest of the deceased partner

In the court below the respondents argued that the surviving partners were taxable in the same manner as the estate of Henry Frick, and that since it was not taxed on its share of partnership earnings for 1920 and subsequent years, but was permitted to regard them as returns of capital, the surviving partners were entitled to the same treatment. The District Court made a finding to the effect that the Federal tax liability of Frick's estate for 1920 and 1925 was settled by the Commissioner's holding that the so-called profits of A. Overholt & Company and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final

distribution in liquidation was made, and the estate of the deceased partner paid the tax on that basis (R. 152–153). The Government objected to the admission of all evidence concerning the liability of Frick's estate on which this finding was based and made appropriate exceptions and assignments covering its admission.[11] Conceding *arguendo* that the evidence is properly in the record, and even if it be assumed that the Mellons and Frick's estate were subject to the same tax considerations, the evidence as to the manner of taxing Frick's estate is utterly inconclusive since it may show merely that the Commissioner erred in his determination of the tax due from Frick's estate. Such an error could not aid respondents' cases here.

But the decisive answer is that respondents' argument loses sight of the fact that the deceased partner's estate and the surviving partners have a different status for tax purposes. The deceased partner's own income tax return must contain his share of the profits earned prior to his death,[12]

[11] See R. 208–212, 271–275, 599–600, 603, 605, 610, 612, 615.

[12] *Bull* v. *United States*, 295 U. S. 247; *Darcy* v. *Commissioner*, 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705; *Davison* v. *Commissioner*, 54 F. (2d) 1077 (C. C. A. 2d), affirming, *per curiam*, 20 B. T. A. 856; *Commissioner* v. *Guaranty Trust Co.*, 89 F. (2d) 692 (C. C. A. 2d), certiorari granted October 11, 1937, No. 301, present term. Cf. *United States* v. *Wood*, 79 F. (2d) 286 (C. C. A. 3d), certiorari denied, 296 U. S. 643; *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584.

but his estate pays income taxes on profits earned after his death only where there is an agreement that the estate shall continue to be a member of the firm and to share profits after his death. *Bull* v. *United States,* 295 U. S. 247; *Degener* v. *Anderson,* 77 F. (2d) 859 (C. C. A. 2d); *Benedict* v. *Price,* 38 F. (2d) 309 (E. D. N. Y.). If there is no such agreement, either express or implied (G. C. M. 7616, IX–1 Cumulative Bulletin 219), the estate is not a partner and the profits belong to the survivors. See *Pomeroy* v. *Helvering,* 68 F. (2d) 411 (App. D. C.), certiorari denied, 292 U. S. 635. The partnership has ceased to exist as a continuing source of income to the decedent (*Commissioner* v. *Guaranty Trust Co.,* 89 F. (2d) 692, 693 (C. C. A. 2d), certiorari granted October 11, 1937, No. 301, October Term, 1937), but it is obvious that it has not ceased to exist as a continuing source of income to the survivors. Any amounts which the surviving partners pay to the estate, even as its distributive share of current earnings, will constitute either the purchase price of the decedent's interest (*Bull* v. *United States, supra,* 254; *Hill* v. *Commissioner,* 38 F. (2d) 165 (C. C. A. 1st), certiorari denied, 281 U. S. 761; *Pope* v. *Commissioner,* 39 F. (2d) 420 (C. C. A. 1st); *Benedict* v. *Price, supra*), or the liquidation of the decedent's interest in the partnership which passed at his

death.[13] The value of that interest as of the date of the decedent's death is subject to estate tax (*Bull* v. *United States, supra*), and only amounts received in excess of such value could be subject to income tax. Hence, all distributions made dur-

[13] It is not necessary here to determine the exact amount of income taxable to Frick's estate.

The partnership agreements provided that on dissolution because of death "the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable" (R. 17, 19). The precise effect of this provision has not been determined, though the District Court loosely referred to it as contemplating "a continuance of the partnership after the death of a partner" (R. 162).

It is unimportant whether the payments of profits to the Frick Estate in 1925 were made on the theory that this was the purchase price of Frick's interest, or that they constituted a liquidation of the decedent's interest in the partnership at the time of his death. Even on the latter hypothesis, the surviving partners may have had to pay to Frick's Estate more than the value of his interest at the time of his death, either because the assets of the partnership increased in value prior to their disposal, or because of the option of the estate in some circumstances to take a share of the profits attributable to the decedent's right in the property of the dissolved partnership. (See Sec. 42, Pennsylvania's Uniform Partnership Act. It is enough for present purposes that under any view the estate was not receiving during 1920 any right to partnership profits as such.

It may be noted that the Mellons are in no position to complain if as survivors they should have been taxed each on half the profits without the right to deduct the expense of the acquisition of the interest of Frick's Estate.

ing the period of liquidation to an estate which is not a partner are payments on capital account.[14]

We have found no court which has ever suggested that the surviving partners can or should be dealt with similarly. See *People's-Pittsburgh Trust Co.* v. *United States,* 10 F. Supp. 139, 142 (C. Cls.): "Where two or more persons are connected with the business and one dies, such event may not affect the taxable periods or the income from the business of the survivors * * *."

In normal circumstances there is no occasion for an interest in property to become capital or to be treated as capital unless it is transferred from one person to another. The death of a partner capitalizes his interest in the partnership because it is transferred to his estate. A value must be put upon the decedent's interest for estate tax purposes, and that value becomes capital in the hands of the decedent's estate just as it would be if transferred to anyone else. Therefore, all future payments to the deceased partner's estate are returns of capital (see *Nichols* v. *United States,* 64 C. Cls. 241, certiorari denied, 277 U. S. 584). except in so far as they may be in excess of the value of the decedent's

[14] Thus the Commissioner ruled with respect to the 1920 income tax of Frick's estate (R. 607): "The distributive partnership interest from A. Overholt and Company and the West Overton Distilling Company, as shown by the agent, has been eliminated from taxable income, as it is held by this office, that the effect of the decedent's death serves to capitalize his interests in the respective partnerships."

interest in the partnership at the date of his death. But the death of one partner does not transfer the interests of the surviving partners. Therefore, the death of one partner does not capitalize the interests of the surviving partners who continue the business in liquidation or otherwise.

We submit, therefore, that the assumption of the court below that Frick's estate and the surviving partners must be dealt with in the same way for tax purposes is wholly erroneous.

3. The taxpayers as surviving partners did not err in filing 1920 returns as partners rather than as trusts

We have shown that the statute and regulations require partnerships to file returns as such until their affairs are finally terminated; that there was no termination in 1920 of the partnerships here involved; and that, on the contrary, they were continuing the business for which they were organized.

We submit that this conclusion is not affected in any way by the provisions of Section 219 of the 1918 Act, *infra,* dealing with the taxation of trust income, or by the fact that surviving partners may be characterized as liquidating trustees under Pennsylvania law.

a. We concede that statements may be found in some Pennsylvania decisions to that effect (*Froess* v. *Froess,* 284 Pa. 369, 374, affirmed, 289 Pa. 69; *Brown's Appeal,* 89 Pa. 139; *Eisenlohr's Estate* (No. 1), 258 Pa. 431), although, as we have hereto-

fore pointed out, Section 30 of the Pennsylvania Uniform Partnership Act provides that on dissolution the partnership is not terminated, but continues until the winding up of its affairs is completed. That conclusion is expressed in several decisions. *Froess* v. *Froess, supra,* 373, 374; *Wood* v. *Wood,* 312 Pa. 374; *Elliott-Lewis Elec. Co.* v. *Hausman,* 104 Pa. Super. 322. But apart from general expressions to the effect that the surviving partners are liquidating trustees, or have fiduciary responsibilities, we find nothing in the Pennsylvania decisions suggesting that they become trustees and that the partnership assets become trust assets in a technical sense. In *Underdown* v. *Underdown,* 279 Pa. 482, 487, 488, withdrawals made by surviving partners during the period of liquidation were dealt with as withdrawals by those still having the status of partners. In such case, it has been said in dictum that the remedy of the estate of the deceased partner against the survivors is to require them to state an account as a "liquidating partner" of the firm's affairs. *Capuzzi's Estate,* 298 Pa. 71, 76. In *Jackson* v. *Gunton,* 218 Pa. 275, a sale, after dissolution of the firm, of land belonging to it is spoken of as a sale of partnership property, rather than as a sale of trust property.

We think that statements in Pennsylvania decisions to the effect that the surviving partners are liquidating trustees, or that they owe a duty to account as trustees, mean merely that they have a

general fiduciary responsibility, rather than that the partnerships become trusts. In *Bracht* v. *Connell,* 313 Pa. 397, the court said (p. 402):

> Partners stand in a fiduciary relationship to copartners; each is under a duty to act for the benefit of all and not to gain individual advantage at the expense or to the detriment of other partners: Partnership Act of March 26, 1915, P. L. 18, part 4, section 21. When a partnership has terminated, for whatever reason or by whatever means, the assets of the partnership must still be handled in accordance with this fiduciary principle.

b. Even if it were the Pennsylvania law that surviving partners become trustees, we question whether that rule would apply here. It is important that the partnership agreements apparently did not contemplate that upon the death of a partner the surviving partners themselves would liquidate the business. Instead, they provide that the surviving partners should appoint a liquidating trustee, and the surviving partners did appoint such a trustee in January 1921. Under those circumstances it is doubtful whether the partners had assumed the status of trustees in liquidation in 1920.

c. But even if the surviving partners were to be regarded as trustees under the Pennsylvania law, it does not follow that they are required or permitted to file Federal income tax returns as trustees rather than as partnerships. The Federal statutes

have their own criteria in such matters, irrespective of local law. Cf. *Weiss* v. *Wiener,* 279 U. S. 333, 337; *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110, 114; *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Fritz* v. *Commissioner,* 76 F. (2d) 460, 461 (C. C. A. 5th).

By its terms, Section 219 (a) of the 1918 Act, *infra,* applies to the income received by estates in process of administration; income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests; income held for future distribution under the terms of the will or trust; income which is to be distributed to the beneficiaries, periodically, whether or not at regular intervals; and income collected by a guardian of an infant to be held or distributed as the court may direct. The statute has generally been applied to express trusts created by will or deed, rather than to trusts created by operation of law. See, however, *Hart* v. *Commissioner,* 54 F. (2d) 848 (C. C. A. 1st); *Commissioner* v. *Owens,* 78 F. (2d) 768 (C. C. A. 10th).[15] Moreover, one purpose of the statute is to recognize a taxable entity in situations where there otherwise would be none. Cf. *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602; *Merchants' L. & T. Co.* v. *Smietanka,* 255 U. S. 509. Therefore, the trust provisions of the statute are not primarily intended

[15] The structure of Section 219 is such that it is difficult to apply it to anything other than express trusts. See Paul and Merten's Law of Federal Income Taxation, Vol. 4, Sec. 34.10.

to apply to cases where the income of the trust would otherwise remain taxable to the creators of the trust. *Douglas* v. *Willcuts,* 296 U. S. 1. Here the members of the firms are individuals engaged in business as partners and recognized by the statute as individual taxpayers, and without a separate taxable partnership entity. The statute does not purport to change the manner of taxation of the surviving partners who continue the business, and there is no reason to resort to the trust provisions for the recognition of a separate taxable entity.

It is not necessary here to determine whether a sole surviving partner may be taxed as a trustee when a contract with the heirs of the deceased partner, calling for a division of partnership property at a future date, expressly provides that in the meanwhile the surviving partner should receive a certain compensation as liquidating trustee and as salary for conducting the business. See *Pomeroy* v. *Helvering,* 68 F. (2d) 411 (App. D. C.) certiorari denied, 292 U. S. 635. Perhaps such an agreement should have no more effect than the trust by operation of law which it recognizes. But in this case, in view of the terms of the partnership agreements, the Mellons could not have been appointed as liquidating trustees (*supra,* p. 57), and in any event it is manifest that the Mellons did not actually take action under those agreements and expressly appoint themselves as liquidating trustees. If they were trustees in 1920, they were such solely by operation of law.

We think the statute was not intended to require or to permit the filing of trust returns in every case where some sort of fiduciary relation arose by operation of law. Cf. *Noble* v. *Hammond,* 129 U. S. 65, 68–69; *Hennequin* v. *Clews,* 111 U. S. 676. If Congress had intended Section 219 to apply generally to partnerships in process of liquidation, we believe that it would have made specific reference to them.

The Treasury Regulations likewise have made no mention of partnerships in liquidation in dealing with trust estates. The regulations do provide, however, that receivers in charge of partnerships shall file returns on partnership forms, just as receivers of corporations are required to file corporation returns. See Articles 424 and 547 of Regulations 45 (Appendix, *infra,* pp. 101, 102). The same regulations have been in effect under subsequent revenue acts (see Articles 424 and 548 of Regulations 62, 65, and 69; Articles 71, 392, and 744 of Regulations 74 and 77), and hence have the force and effect of law. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492–493; *Dismuke* v. *United States,* 297 U. S. 167, 174; *Brewster* v. *Gage,* 280 U. S. 327, 337; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273. The regulation has accordingly been sustained as applied to corporations. *First Nat'l Bank of Greeley, Colo.* v. *United States,* 86 F. (2d) 938 (C. C. A. 10th); see also *North American Oil* v. *Burnet,* 286 U. S. 417, 423.

We can see no basis for drawing a distinction between receivers of partnerships and so-called

liquidating trustees of partnerships, in imposing an obligation for making partnership returns. Nor is there any substantial reason under the revenue law for holding that a partnership business in process of liquidation by the partners is a trust, whereas a partnership business in the hands of a receiver is still, for the purpose of accounting for its profits, a partnership.

We submit that in 1920 the partnerships were not trust estates within the meaning of Section 219, and that the surviving partners were not required or permitted to file returns as trustees.

C. THE THEORY OF THE COURT BELOW, THAT THE PARTNERSHIP EARNINGS WERE RETURNS OF CAPITAL, WILL NOT SUPPORT A JUDGMENT FOR THE RESPONDENTS

The Circuit Court of Appeals predicated its decision in favor of the respondents upon the theory that the death of Frick dissolved the partnerships, and that no gain would be realized by the surviving partners until the amounts received by the several interests exceeded the cost to them of their respective investments. Obviously, even if this theory is correct, it will support a judgment for the respondents only if the aggregate amounts received by each of the Mellons up to the end of 1920 were less than the cost basis of their capital investments in the partnerships. If the amount to be received is unknown, but the cost has been recovered, all subsequent amounts are taxable as they are received. *Burnet* v. *Logan,* 283 U. S. 404.

The record does not disclose whether the Mellons had recovered their cost basis. The District Court's findings are incomplete in this respect. It failed to find the cost to each of them of his partnership interest, how that cost should be computed,[16] or what portion of his investment, if any, had been recovered prior to and during 1920. All of these findings were indispensable to justify the court's legal conclusion that no taxable income was received in 1920. See *Helvering* v. *Rankin,* 295 U. S. 123; *United States* v. *Esnault-Pelterie,* 299 U. S. 201.

The only material finding of the District Court relating to this issue is as follows (R. 154–155):

> The sum received from the sale of whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon.

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[16] The partnerships acquired the assets of the two corporations, but they may have been conveyed by the corporations to the three individuals in liquidation of the corporations. The partnership agreements had provided, however, that the assets thus taken over should be partnership capital, in which each partner should have a one-third interest (R. 43–46). There are no findings as to the value of the assets taken over; nor does the record show what investment the two Mellons and Frick made in the corporations, or whether they realized a gain or loss on the liquidation of the corporation.

This finding is inadequate for the reason that it does not state what amounts were invested in the two partnerships by each partner, or what portion of his capital investment was previously recovered by him. See Article 1570 of Regulations 45, *infra*, p. 103. Instead, it makes comparison between the cost of the assets of the partnerships and the earnings of the partnerships from one source—namely, the sale of whiskey, or properly speaking, the sale of whiskey certificates—and even as to this gives no specific figures. Moreover, if by that finding the District Court meant to imply there were no other partnership earnings, its finding is contrary to the evidence. The partnership return of A. Overholt & Company for 1920 shows the receipt of $165,868.40 from other sources (R. 351f). Both partnerships had income from rents, interest, storage, bottling, and casing operations (R. 351, 352).

The Circuit Court of Appeals had no authority to supply necessary findings. *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *Helvering* v. *Rankin*, *supra*. Moreover, its statement that it was conceded that "the base for computation of the tax liability arising by reason of their respective interests in A. Overholt & Company was $990,755.53 and $60,505.66 in West Overton Distilling Company" (R. 711) is erroneous. No such concession was made. Apparently the court extracted these figures from the sixty-day deficiency letters relating to the 1925 tax liability of the two Mellons (R. 495–496, 501–502). These letters give the values of

each partner's interest in the two partnerships as of the date of Frick's death on December 2, 1919, but give no explanation why the values at that date, instead of the actual cost of each partner's interest in the firms, were used. The tax liability of the two Mellons for 1925 has not been finally determined, for the reason that there is pending before the Bureau of Internal Revenue a claim for refund for that year, involving the question as to what profit, if any, is to be reported from the liquidation of the partnerships. That case will not be acted upon until this case is terminated. We submit, therefore, that statements made in the 1925 deficiency letters as to the basis or figures to be used in computing the gain from liquidation are not binding in this proceeding. Moreover even if that basis had been conceded, no concession has been made as to whether or not the cost basis has been recovered.

We submit, therefore, that the Circuit Court of Appeals' finding as to the cost basis of each partner's interest should be disregarded; and that the findings of the District Court will not support a judgment for the respondents, even if the court's theory be correct that each partner's share of the partnership earnings after Frick's death should be applied against the cost of his partnership interest and that only the excess should be taxed.

II

IN EQUITY AND GOOD CONSCIENCE RESPONDENTS ARE NOT ENTITLED TO RECOVER UPON THE THEORY THAT THE MELLONS SHOULD HAVE BEEN REGARDED AS TRUSTEES

Even should this Court hold that the earnings of A. Overholt & Company and West Overton Distilling Company were not taxable to the Mellons as partnership earnings, but were taxable as the income of trusts of which they as surviving partners were trustees, it does not follow that respondents are entitled to recover.

Two preliminary matters must be discussed. First. It is clear that even if the companies were trusts, the income was taxable in 1920. In the brief in opposition to the petition for certiorari (pp. 15, 16) respondents state that since the surviving partners had a reasonable time to liquidate the affairs of the companies, and could not make distribution until all liabilities had been satisfied, "neither the surviving partners nor the estate of the deceased partner could be taxed until final distribution." But respondents nowhere state or contend that the delay in accounting to Frick's estate precludes the Commissioner from regarding the income as having been realized in 1920 by the Mellons as liquidating trustees. Respondents venture no farther than to state (Br. 16) "But even were we to admit that the partnerships realized taxable income in 1920 from the sale of whiskey certificates, it was

income to the liquidating trustees and taxable to them as a separate entity." A suggestion that no taxable income was realized in 1920 would be manifestly unsupportable.

The companies were on an accrual basis (R. 159; see *supra,* pp. 6, 36, n. 8), sales of the whiskey took place in 1920, and the profits on the sales were undoubtedly earned in that year. Section 219 (b) specifically provides that "the net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 212 [defining 'net income' of individuals]." Even if the whiskey constituted corpus of the trusts, they would be taxable on income received from its sale. See *Helvering* v. *New York Trust Co.,* 292 U. S. 455. Assuming that the income was taxable to the trustees rather than the beneficiaries,[17] it was taxable in 1920.

Second. The companies had the same net income in 1920 whether they were trust estates within the meaning of Section 219 of the Revenue Act of 1918 (Appendix, *infra,* p. 95), or partnerships. The trust is taxed as a unit, and, as stated above, its net income is determined in the same way as the net income of individuals (Section 219 (b), *infra*).[18]

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[17] Respondents must maintain that the tax should have been paid by the trustees, otherwise, the correct amount having been paid by the Mellons as individuals, respondents could not recover in this action.

[18] Thus it is liable for both normal tax and surtax (Section 219 (a), *infra*), except in the case of the net income of trusts which is to be distributed to beneficiaries periodically. In

The net income of partnerships is also computed in the same way as that of individuals.

If this Court should hold that the companies must be regarded as trusts, nevertheless in equity and good conscience respondents [19] should not be allowed to recover back the taxes wrongfully collected from them as partners if they would have had to bear a corresponding tax burden as beneficiaries and transferees of a trust estate. The decision of the court below to the contrary is in direct conflict with the principles established by *Stone* v. *White,* 301 U. S. 532, opinion amended by this Court, October 11, 1937.

The District Court did not definitely rule upon the Government's third defense, which raised this issue in each suit (R. 87–90, 117–120), and did not make findings with respect to this issue; though the Government made requests for such findings (R. 625–644, 638–641, 643–644, 647, 648–668, 662–665, 667–668, 671), and, in the Circuit Court of Appeals,

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trusts of that character, the fiduciary files an information return, stating the distributable shares of the beneficiaries. Section 219 (a) (4) and (b), *infra.* See, also, Section 219 (c), *infra,* which allows a trust to deduct amounts properly paid or credited to the beneficiary. It is not contended that those exceptions apply here.

[19] Since the institution of these actions, A. W. Mellon and R. B. Mellon have died and the executors of their estates have been substituted as parties. But we cannot conceive that an equitable defense which would be good as against the two individuals would not be equally good as against their personal representatives.

assigned as error the court's failure to make them (R. 228–229, 231–236, 238–240, 244–245, 249–250, 292, 295–300, 301–304, 308–309, 313). This defense is supported, however, by admitted facts contained in the record.

A. PRELIMINARY

This defense derives its force from the inequity of allowing a recovery against the Government when it is barred from collecting the taxes rightfully due to it. We ask this Court to reverse the error of the courts below in failing to give effect to this defense. The parties below proceeded on the assumption that the statute of limitations has operated to bar the assessment of a tax for 1920 upon the theory of a trust estate. We assume that this Court will follow its ordinary course and decide only the questions raised by the petition and assignment of errors,[20] *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Clark* v. *Williard*, 294 U. S. 211, 216; *Morehead* v. *People ex rel. Tipaldo*, 298 U. S. 587, 605, and will not decide, at this juncture, whether or not the statute in fact has run. We shall briefly set forth the considerations which we submit make any such decision inappropriate.

1. The companies filed returns as partnerships on March 15, 1921 (R. 351, 351a, 352–352a). No income tax returns for 1920 were ever filed by or

[20] Respondent, of course, will not urge in support of the judgment below that the statute of limitations has not run.

for the companies as trusts. Section 250 (d) of the Revenue Act of 1921 (which is applicable to taxes imposed under the Revenue Act of 1918, see *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 459) provides that the taxes must be assessed "within five years after the return was filed," that no suit for their collection may be begun thereafter, and that in the case of a failure to file a return, the amount of tax due may be determined, assessed and collected, and a suit begun "at any time after it becomes due."

If the partnership returns filed by the companies were sufficient to start the running of the statute of limitations against the assessment and collection of taxes from the companies as trusts, then the period for assessing an additional tax against the trusts expired March 15, 1926 (Sec. 250 (d), Revenue Act of 1918; Sec. 250 (d), Revenue Act of 1921), and the period for assessing the tax against the two Mellons as transferees expired March 15, 1927 (Sec. 280 (b), Revenue Act of 1926). If, however, the filing of these returns were not sufficient to start the running of the statute of limitations, there has been no time limit upon assessment or collection, either as against the trusts or the transferees. See *United States* v. *Updike,* 281 U. S. 489; *Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245; *Commissioner* v. *Krug,* 78 F. (2d) 57 (C. C. A. 9th). Whether or not the purely informational partnership return was adequate to start the statute of limitations running has not been settled by this Court.

2. As a practical matter, the Commissioner's failure to assess the tax on the theory that the statute of limitations has not run is consonant with sound administration of the revenue laws. It should be remembered that though the tax dispute with the Mellons started in 1922, it was not until 1932 that the Mellons even suggested that the companies should have been regarded as trusts, and not partnerships. See *infra,* p. 82. When the Mellons brought this suit, the Commissioner was of the opinion, as he still is (see *supra,* pp. 26–61), that the companies were partnerships in 1920. Assuming that the statute had not run, since the companies as trusts had filed no taxpayer's return but only an informational return, it would have been obviously unwise for the Commissioner to have made an assessment against the companies as trusts, and the Mellons as transferees. He would have been further complicating an already complicated matter. Such action was not necessary to preserve the Government's rights; if the statute had not then run, because trust tax returns had not been filed for the companies, it would not subsequently run. He would have been subject to the accusation and inference that he was assessing the companies as trusts because he believed that they were trusts, rather than because he was seeking merely to protect the revenues in the most advantageous manner.[21]

[21] In this connection, it may be noted that respondents and the lower courts have been alert to comment on the Com-

We have indicated why the Commissioner may not have assessed the trusts, but it was clearly necessary for him to argue the equitable defense doctrine, accepting the taxpayer's implicit premise that the statute had run.[22] This was urgent—for if the statute had run, this was the only appropriate time and manner to defeat what the Government regards as a claim without equity and good conscience.

3. In the lower court both parties assumed that the Government could not now proceed against the trusts or transferees (R. 87, 127, 132, 140, 145). The Government argued below as it argues here that (upon the premise tacitly advanced by the plaintiffs—that the statute had run) the demand for refund should be denied as without equity and good conscience. In failing to make appropriate findings with respect to this defense, and in disregarding this defense submitted by the Government, the courts below apparently deemed it wholly inapplicable to income tax cases involving periods of limitation,[23] and thereby fell into fundamental

missioner's action in taxing the income from the sale of the whiskey in 1925, though that was merely a precautionary move, and was a *necessary* precaution. See *infra*, p. 90.

[22] Of course, if the defense were upheld, the Government could not then proceed against the trusts. If it did, it would be subject to an action for refund, *Bull* v. *United States*, 295 U. S. 247.

[23] In the earlier case of *United States* v. *Arnold*, 89 F. (2d) 246, the Court of Appeals for the Third Circuit had expressly ruled that equitable considerations could not be used to shorten the limitation period governing collection of taxes.

error. We think this error should be corrected in this Court, and the cause reversed and remanded. It may be that the lower courts, even when they assume that the law of income taxation admits of a doctrine of equitable defense, will find some other reason why it should not apply to this case—perhaps because the Commissioner is not barred by the statute of limitations. The primary step now is to correct the lower court's fundamental error, and let such other matter come out in further proceedings. Compare *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, 245, and see particularly the practice adopted in *Lanasa Fruit S. S. Co.* v. *Universal Insurance Co.*, No. 57, this Term, decided January 10, 1938.[24]

It was because of a conflict with this decision that this Court granted certiorari in *Stone* v. *White*, 78 F. (2d) 136 (C. C. A. 1st), and affirmed the latter case. The lower court decided the instant case before this Court decided *Stone* v. *White*, 301 U. S. 532.

[24] We are met by two preliminary questions. The first of these is with respect to the sufficiency of the declaration. It is suggested that the declaration does not allege that the bananas were shipped in sound condition and that they would have been merchantable at the end of a normal voyage, and that there is no allegation as to the duration of the delay. It does not appear that these questions were raised in the District Court and they were not dealt with by the Court of Appeals, which evidently assumed the sufficiency of the declaration to present the main question as to the interpretation of the general coverage clause. Both courts below have decided the case upon the assumption that the fruit was in sound condition when shipped and would have been merchantable at the end of the voyage had it not been for the stranding and the consequent delay. In view of this course of proceedings we

4. In any event, we assume that this Court will not decide at this time whether the statute has run. On that question it will be without the assistance which lower courts are often able to render—even with respect to the analysis of questions of law. On that question the parties here would be turned about, the respondents arguing that the statute has run, and the Government arguing against its equitable defense if it argues that the statute has not run. In the lower courts this last difficulty could be adjusted by the filing in this suit of a counterclaim against the respondents as transferees of the trusts, or by the institution in the same district court of another, contemporaneous suit against respondents as transferees.

5. However, if the Court should be of the opinion that the running of the statute of limitations *vel non* must now be decided and that the parties must take their position on that matter, then we argue that the statute has not run. A discussion of authorities both *pro* and *con* is set out in Appendix B; we consider the best view to be that the statute has not run. We appreciate that if the Court holds that the statute has not run, our equita-

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make the same assumption. If any question as to the condition of the cargo or length of the delay and its effect had been presented in the trial court, it might have been met by amendment of the declaration and the issue could have been tried; and if the main question, upon the assumption stated, has been wrongly decided and the case is remanded to the District Court, there will still be opportunity to try any other issues of fact or law which may properly be presented."

ble defense will fall. But we insist that unless the Court holds that the statute has not run, the equitable defense is valid.

B. THE PRINCIPLES ESTABLISHED BY THIS COURT IN *STONE* V. *WHITE* BAR RECOVERY

The Government contends that the courts below should have held that the two Mellons, or their legal representatives, are not in equity and good conscience entitled to the refunds. The cases present exactly the same equitable situation that was involved in *Stone* v. *White, supra,* although the facts differ slightly. In that case the trustees had paid taxes on trust income which should have been paid by the beneficiary of the trust. Recovery of the taxes by the trustees was denied on the ground that the proceeds of recovery would go to, and unjustly enrich, the beneficiary; and hence that the trustees could not show that they were equitably entitled to the money.

The Court there pointed out that an action against a Collector for a refund of taxes is in the nature of an action in *indebitatus assumpsit* for money had and received and is governed by the same equitable principles (see *United States* v. *Jefferson Electric Co.*, 291 U. S. 386); and that in such actions it is open to the defendant to show any state of facts which, according to equitable standards, would deny the right of recovery.[25] The Court said, in part (pp. 537–538):

[25] This principle has been applied by the courts in cases involving many different situations. See *Lewis* v. *Reynolds*, 284 U. S. 281, 283; *United States* v. *Jefferson Electric Co.*,

Equitable conceptions of justice compel the conclusion that the retention of the tax money would not result in any unjust enrichment of the government. All agree that a tax on the income should be paid, and that if the trustees are permitted to recover no one will pay it. It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, which is lacking here. No injustice is done to the trustees or the beneficiary by withholding from the trustees money which in equity is the beneficiary's, and which the government received in payment of a tax which was hers to pay. A single error on the part of the taxing authorities, excusable in view of persistent judicial declarations, has caused both the underassessment of one taxpayer and the overassessment of the other. But the error has not increased the tax burden of either, for whether the tax is paid by one or the other, its source is the fund which should pay the

supra; Crocker v. *Malley*, 249 U. S. 223; *Bull* v. *United States*, 295 U. S. 247; *Champ Spring Co.* v. *United States*, 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852; *Crossett Lumber Co.* v. *United States*, 87 F. (2d) 930 (C. C. A. 8th); *Hartwell Mills* v. *Rose*, 61 F. (2d) 441 (C. C. A. 5th); *United States Paper Exports Ass'n* v. *Bowers*, 80 F. (2d) 82 (C. C. A. 2d); *New York Life Ins. Co.* v. *Anderson*, 257 Fed. 576 (S. D. N. Y.), reversed, on other grounds, 263 Fed. 527 (C. C. A. 2d); *Globe Gazette Printing Co.* v. *United States*, 13 F. Supp. 422 (C. Cls.), certiorari denied, 298 U. S. 682; *Lit* v. *United States*, 18 F. Supp. 435 (E. D. Pa.). See, also, *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540.

tax, and only the equitable owner of the fund is ultimately burdened. Cf. *United States Paper Assn.* v. *Bowers,* 80 F. (2d) 82. Since in equity the one taxpayer represents and acts for the other, it is not for either to complain that the government has taken from one with its right hand, when it has, because of the same error, given to the other with its left.

The present actions are suits against the Collector for a refund of taxes, as was the action in *Stone* v. *White, supra,* and the principle, that no recovery can be had in that type of action without showing that the defendant holds money to which the plaintiff is equitably entitled, is applicable. Moreover, as will be shown below, the principle recently announced in *McEachern* v. *Rose,* No. 6, this Term, decided November 8, 1937, has no application to the instant case.

We shall here set out the relevant factors emphasized by this Court in *Stone* v. *White, supra,* which negatived the right of the trustees to recover *ex aequo et bono,* and shall show that those factors obtain in this case.

1. The ultimate burden of the tax is the same whether the companies are considered as partnerships or trusts

a. In *Stone* v. *White, supra,* the tax was erroneously paid by the trustees, but recovery by the trustees was denied for the reason that the refund would have inured to the advantage of the beneficiary, who should have paid the tax. Here, assuming for the purpose of this argument that

A. Overholt and Company and West Overton Distilling Company should have been taxed as trusts, the tax should not have been paid by the Mellons as partners, but should have been paid by them as trustees for the firms mentioned. But if the tax had been paid on the trust theory, it is apparent that each of the Mellons would have actually borne one-third of the burden of that tax, for the corpus of the liquidating trust would have been diminished to the extent of the tax, and each respondent had an equitable interest in one-third of the corpus. At least to the extent of one-third of the tax which would have been imposed on the trusts, neither respondent may complain. Although each Mellon was taxed as a partner "only the equitable owner of the fund [which should pay the tax] is ultimately burdened." *Stone* v. *White, supra,* 538. That is, if the tax had been correctly laid, the Mellons would have borne the burden of two-thirds of the tax laid on the trust. To that extent, it does not comport with equity and good conscience for them to complain that they should have suffered that burden indirectly, through the trust, rather than directly as individuals.

b. No distinction from *Stone* v. *White, supra,* can be made on the ground that there the Court denied recovery lest the refund inure to the advantage of the beneficiary who should have paid the tax, whereas here the refund will inure to the benefit of the Mellons, or their estates, whereas the tax should have been paid by the trust units.

In the first place, it is clear that the Court would have reached the same result in *Stone* v. *White* if in that case the beneficiary rather than the trustee had paid the tax and the recovery would directly have inured to her benefit, whereas the tax in form should have been paid by the trustee. Thus, the Court said (pp. 537, 538):

> But the error has not increased the tax burden of either, for *whether the tax is paid by one or the other,* its source is the fund which should pay the tax, and only the equitable owner of the fund is ultimately burdened. Cf. *United States Paper Assn.* v. *Bowers,* 80 F. (2d) 82. Since in equity the one taxpayer represents and acts for the other, *it is not for either to complain that the government has taken from one with its right hand, when it has, because of the same error, given to the other with its left.* [Italics added.]

It is enough, to bring this case within the doctrine of *Stone* v. *White,* that the refund will be for the advantage of those who would have borne the actual burden of the tax if correctly laid.

Moreover, the Government need not rely solely on the ultimate burden which would have rested on the Mellons had the taxing officials collected the tax from the trust unit, for it appears that the Government could have collected the tax directly from the Mellons, as transferees. The replies to the Amended Affidavits of Defense admitted that on or prior to December 31, 1925, all of the moneys,

properties, and assets of A. Overholt & Company and West Overton Distilling Company were distributed to the two Mellons and Frick's estate (R. 130–131, 143–144). Hence, the two Mellons were the trustees, beneficiaries, and distributees of the fund which should have been used for the payment of the tax, and would have been liable for its payment as transferees had the Government proceeded against them in time. See Section 280 of the Revenue Act of 1926, *infra*.

It further appears that the amounts received by each of the Mellons upon liquidation exceeded the tax liabilities of $551,914.70 and $66,674.32 which would have been due from the two companies if they had been taxed for 1920 as trusts (R. 130–131, 143–144). It is clear that, had the Government acted timely, it could have proceeded against any of the transferees, including either of the Mellons, for the total amount of the taxes which would have been due from the companies, and left the transferees to settle with each other their mutual rights of contribution. *Phillips* v. *Commissioner*, 283 U. S. 589, 603–604.

The Government submits that one may not recover what he erroneously paid as a partner when he might have been made directly liable for as much, or more, as a transferee. Compare R. 119. However, for purposes of this case, we will not undertake to inquire whether it would be equitable to deny respondents any recovery and refer them to their right of contribution against the Frick

estate for the recovery of any amount which they have paid in excess of one-third of the trust's liability. *Phillips-Jones Corporation* v. *Parmley,* No. 45, decided December 6, 1937. We do insist that to the extent of one-third of the tax which should have been paid by the trusts, each of the Mellons would have been liable as a transferee. To that extent it would be inequitable for the respondents to recover taxes paid by the Mellons as individuals, on the ground that the taxes should have been laid on the companies as trusts, for, if that procedure had been followed, each of the Mellons would ultimately have paid, as transferee, at least one-third of the taxes attributable to the companies. This Court has already held that a taxpayer who has paid a tax as an association instead of as a trustee may recover only the amount in excess of what should have been paid on the correct theory. *Crocker* v. *Malley,* 249 U. S. 223, 235.

c. It must also be noted that as partners, the Mellons each paid a separate tax on one-third of the income realized by the companies, which is not necessarily equal to one-third of the tax which the trusts would have paid on the total income. The difference will depend at least in part on the individual surtax bracket in which the income attributable to the companies would fall. The Government therefore suggests that, if the Court agrees that the doctrine of *Stone* v. *White* is applicable, the cause be remanded with instructions to the District Court to compare the amount of tax which

the Mellons paid because of the partnership income (both in their original return and on the Commissioner's additional assessment) with one-third of the amount which should have been paid by the trusts. If the latter sum is greater, the suits should be dismissed, as was done in *Stone* v. *White, supra.* If the former sum is greater,[26] respondents should recover only the amount of the difference, with appropriate interest, according to the solution prescribed by *Crocker* v. *Malley, supra.* See also *New York Life Ins. Co.* v. *Anderson,* 257 Fed. 576 (S. D. N. Y.), reversed on other grounds, 263 Fed. 527 (C. C. A. 2d).

2. There was a single, excusable, and at most, mutual error

In this case, as in *Stone* v. *White,* there was at most a single error, the characterization of the companies as partnerships rather than liquidating trusts. The error, although not grounded on prior

[26] The record indicates that this may be the fact. If treated as trusts, according to the Commissioner's determination, A. Overholt & Company would have been liable for $551,914.70 (R. 393–394), and West Overton Distilling Company for $66,673.42 (R. 394–395). The amount which each respondent would have borne is one-third of the sum ($618,588.12) or $206,196.04 (R. 393–395). The record does not clearly disclose the amount of tax paid by the Mellons attributable to income from these companies. Thus, A. W. Mellon paid an additional assessment of $190,419.70, plus interest, to recover which he brought this suit (R. 27). The record does not show how much tax he paid on the $54,311.29 included in his original return as distributable partnership income ($48,350.74 from A. Overholt & Co. and $5,960.55 from West Overton Distilling Company) (R. 404a). In his statement of claim he averred that he had originally

judicial declarations as in *Stone* v. *White,* was nevertheless excusable. The considerations which we have advanced in Point I of this brief seem to us to compel the conclusion that the partnership return was proper; at the least, they indicate a debatable question of law with respect to which the conclusion adopted by the taxpayers and the Commissioner was perhaps the most reasonable of the alternatives. It is to be noted that the District Court was also of the view that returns were properly made on a partnership basis (R. 176). Moreover, there exists here an equitable consideration not present in *Stone* v. *White* for here the mistake was at most mutual, and indeed may be ascribed to the Mellons themselves. In the partnership returns filed for 1920 (R. 351, 352), and in their individual returns (R. 404a–404c, 406a to 406c), the Mellons claimed and represented under oath that the companies were partnerships.[27] The Commis-

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overpaid his tax by $27,066.55 (R. 8). If this is the amount of his original tax payment attributable to his partnership interests, he paid $217,486.25 on his income from the companies ($190,419.70 plus $27,066.55). His executor should recover the amount by which this exceeds $206,196.04 (one-third of the tax which the trust should have paid), or $11,290.21. Similarly, R. B. Mellon, who also returned $54,311.29 as income from these companies (R. 406a), averred that he had originally overpaid his tax by $38,952.14 (R. 35). Added to the $175,259.70 additionally assessed (R. 41), this would put the tax on his share as partner at $214,211.84, or only $8,015.80 more than one-third of the tax which the trust should have paid.

[27] The Circuit Court of Appeals concluded (R. 711) that at most there was a mutual mistake of law. The court did

sioner accepted the partnership method of reporting income, and this fact was made clear to the Mellons in the reports of the Revenue Act for 1920 (R. 48a–58a), and by Bureau letters of December 20, 1922, and December 16, 1926 (R. 433, 438, 421, 427). The Mellons failed to object to such action in their protests filed January 19, 1923, and January 1, 1927 (R. 452a, 453, 456, 457, 460–463, 468), and indeed it was not until November 1932, after the date on which it is assumed the limitation period for assessment against the trust expired, that they filed the brief, protesting against the proposed rejection of their refund claim, which first raised this trust issue (R. 572a–h).

3. The Government is not pressing a stale claim

In *Stone* v. *White, supra,* the Court adverted to the fact that the Government "is not reviving a stale claim" (p. 539). Presumably the Court had reference to the fact stated in the opinion, as amended October 11, 1937, that—

> A deficiency against the trustees was assessed by the Commissioner before * * * collection from the beneficiary had been barred by the statute of limitations.

In *Stone* v. *White* that fact was useful to refute any possibility that the Government, aware that the statute had barred assessment of the bene-

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not discuss the consideration that though the Commissioner was informed of Frick's death, the filing of partnership returns by the companies may have constituted a representation of fact, e. g., that his estate was a member of a new partnership.

ficiary, had proceeded in desperation against the trustee, hoping thus to tax the beneficiary.

a. It is submitted that here it would suffice, in refuting the possibility that the Government was reviving a stale claim, to point out that the error was initiated by the taxpayers' own returns, rather than by any assessment by the Government which might be deemed belated. Good faith may also be shown by positive administrative action taken at a time when the correct procedure was still available, as in *Stone* v. *White,* but the Government should not be prejudiced in this regard by the circumstance that it agreed with the taxpayer from the first, so that no necessity for positive administrative action ever arose.

b. In this case, however, it appears that positive administrative steps were taken prior to the running of the statute of limitations on assessments against the companies as trusts.

Assuming that the statutory period for assessment against the trusts expired March 15, 1926, prior to that date, on December 20, 1922, the Commissioner had taken positive administrative action, i. e., had sent letters to the Mellons proposing additional assessments for 1920 (R. 433, 438). These letters were based upon the position that the Mellons were taxable upon their distributable interests in the earnings of the companies (R. 438, 443). Moreover, assuming that the statutory period for assessment against the transferees expired March 15, 1927, prior to that date, on February

21, 1927, the Commissioner sent the Mellons sixty-day letters, advising them of a determination of individual tax deficiencies for 1920 (R. 411–415, 416–419). It is not material that the Commissioner did not actually assess a deficiency against the Mellons before the statute had run in favor of the trusts. Though the opinion in *Stone* v. *White* states that a deficiency was "assessed" against the trustees before collection from the beneficiary had been barred, the word was intended, in a broad sense, to embrace determinations of deficiency. The record in that case shows that the beneficiary filed her 1928 return on or about March 15, 1929 (R. 9), that therefore the two-year period of limitations governing assessments (Sec. 275 (a) of the Revenue Act of 1928) would normally have expired on or about March 15, 1931. The record discloses that on February 12, 1931, the Commissioner sent the trustee a sixty-day letter advising him of the determination of a deficiency (R. 19), which letter, of course, had the effect of suspending the running of the statute of limitations on the making of an assessment (Sec. 277 of the 1928 Act). The record sets out that the amount was "duly assessed" (R. 8), but does not reveal the date of assessment.

The sixty-day letter in *Stone* v. *White* has its exact counterpart in the sixty-day letters sent to the Mellons prior to the expiration of the period for assessment against them as transferees, and in the letters of December 20, 1922, sent prior to the expiration of the period for assessment against the

trusts proper. It is clear that the Government is not reviving a stale claim.

4. No statute of limitations prevents the assertion of this equitable defense

Assuming that at the time of this suit the statute of limitations prohibited the Government from proceeding directly against the trust, or against the Mellons as transferees, this fact does not preclude the assertion of an equitable defense grounded upon the right, which the Government had, to lay the tax burden on the Mellons by taxing the trusts, or the Mellons themselves as transferees.

Sec. 250 (d) of the Revenue Act of 1921 provides that the amount of tax due shall be determined and assessed by the Commissioner within five years after the return was due, and that "no suit or proceeding for the collection of any tax shall be begun" after the expiration of that five-year period. Like Sec. 275 (a) of the Revenue Act of 1928, this provision at most prohibits a set-off or counterclaim and not an equitable defense. See *Stone* v. *White*, *supra*, pp. 538–539:

> The statutory bar to the right of action for the collection of the tax does not prevent reliance upon a defense which is not a set-off or a counterclaim, but is an equitable reason, growing out of the circumstances of the erroneous payment, why petitioners ought not to recover.
>
> * * * Its defense, which inheres in the cause of action, is comparable to an equita-

> ble recoupment or diminution of petitioners' right to recover. "Such a defense is never barred by the statute of limitations so long as the main action itself is timely." *Bull* v. *United States,* 295 U. S. 247, 262; *Williams* v. *Neely,* 134 Fed. 1, 13. * * *

McEachern v. *Rose, supra,* is not applicable here. In that case the administrator of a decedent's estate neglected to return income with respect to a certain item in 1928, and erroneously returned it as income for 1929, 1930, 1931. On suit for refund of the overpayments for 1929, 1930, 1931, the Collector was not permitted to urge the 1928 deficiency as a defense. The Court relied on Sec. 607 of the Revenue Act of 1928 (payment of a tax after expiration of a period of limitation shall be considered an overpayment), and on Sec. 609 (a) of the Revenue Act of 1928 (credit against a liability shall be void if payment thereof would be considered an overpayment under Sec. 607), and held that, under these explicit provisions, the payments for 1930 and 1931, made after collection of the 1928 tax was barred, were overpayments, and that the same result obtained with respect to the 1929 payment since no credit thereof was allowed (i. e., no schedule of overassessments was signed, Sec. 1104 of the Revenue Act of 1932), prior to the running of statute on the collection of the 1928 tax.

In answer, it may first be noted that these statutory provisions were not in effect prior to the date of enactment of the 1928 Act, and that no similar

sections appeared in the earlier Act. Therefore, in this case it is not true, as was the fact in *McEachern* v. *Rose, supra,* that—

> * * * Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes because of taxpayer's failure to pay other taxes which might have been but were not assessed against him.

Moreover, even today those provisions would not apply to a suit like the present one. *Stone* v. *White* was governed by the 1928 Act, and yet Secs. 607 and 609 were held not to preclude the Government's assertion of its equitable defense. In *McEachern* v. *Rose,* this Court said:

> Sections 607 and 609 do not apply in the circumstances disclosed in *Stone* v. *White, supra.* There testamentary trustees had paid from income a tax upon it which should have been paid by the beneficiary, and it was held that they were not equitably entitled to recover the tax after the statute had barred collection from the beneficiary. The assessment of a deficiency against the trustees and the payment of it by them were not barred by limitation. Hence Section 607 did not compel a recovery. Section 609 did not require it. The commissioner neither sought, nor did Section 322, regardless of any period of limitation, permit him to credit the amount which the one taxpayer had paid against the tax which another should have paid. Equitable considerations not within the reach of the statutes denied a

recovery. It was enough, in the peculiar facts of the case, that the trustees had suffered no burden and that the Government was not unjustly enriched.

Here, as in *Stone* v. *White,* the statute did not bar the assessment of the additional deficiency against the Mellons. The payment by the Mellons was made in the *same year* in which the companies should have made payment, and was certainly made. The Mellons paid the amount as a tax on 1920 income, and it is as a tax on 1920 income that the tax should have been paid by the companies or by the Mellons as transferees. The Commissioner is not attempting to credit an overpayment on the income for one year against a deficiency on the income for another year. As in *Stone* v. *White,* the Commissioner is neither attempting, nor maintaining that he has the power, to make an administrative credit of the overpayment of one taxpayer (the Mellons) against the deficiency of another taxpayer (the companies), or against the deficiency of the same taxpayer acting in another capacity than that of an individual (Mellons as trustees).

C. THE TAX LIABILITY OF THE TWO MELLONS FOR 1925 HAS NOT BEEN FINALLY DETERMINED AND CANNOT AFFECT THE GOVERNMENT'S AFFIRMATIVE DEFENSE

In the court below the respondents argued that the Government could not sustain its equitable defense, for the reason that it had taxed the two surviving partners on their distributive shares of

the 1920 profits of the two companies for 1920 and again for 1925, and that the equities were balanced against the Government.

We concede that the District Court found that the profits of $281,779.95 and $52,814.28 from the two partnerships were taxed to the two surviving partners in 1920 and again in 1925 (R. 155, 169). We also concede that in the deficiency letters dated March 15, 1929, proposing the assessment of additional taxes against A. W. and R. B. Mellon for 1925 (R. 491–496, 497–502), the tax was computed upon the basis of their having realized a gain in liquidation equal to the difference between the value of their partnership investments as of the date of Frick's death and the amounts distributed to them in liquidation, without taking into account the portion of such distributions which had previously been taxed. We also admit that under Article 1570 of Regulations 45, *infra,* earnings previously taxed should be added to the cost basis in determining the gain upon liquidation of a partnership interest.

But we do submit that these circumstances are not material in the present controversy, for the reason that the tax liability of the two Mellons for 1925 has not finally been determined. While the taxes due on the basis of the deficiency letters have been paid, claims for refund have been filed (R. 508a, 510a) which question the correctness of the Commissioner's determination. These claims have not been acted upon (R. 512), and will not be dis-

posed of until this litigation is terminated. The two Mellons filed the claims to protect their interests until the issues here involved should be decided, and the Government has delayed action on the claims to protect its interests. If it should finally be determined that the profits of the two companies were taxable to the surviving partners in 1920, that fact will be taken into account in the action upon the claims.

It cannot be assumed, however, that a refund will be due for 1925, whatever the outcome of these cases. When a claim for refund is filed, the entire tax liability may be redetermined, even though a new assessment is barred. *Lewis* v. *Reynolds,* 284 U. S. 281. Facts not disclosed by this record may show that the two Mellons are liable for additional taxes for 1925. Moreover, on the basis of the facts which are disclosed, it is not clear that additional taxes are not due, even if the profits taxed to the surviving partners in 1920 and subsequent years are added to their cost basis in measuring the gain from the liquidation in 1925.[28]

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[28] The deficiency letters show that the profits computed were taxed as capital net gains, subject to a 12½% rate under Section 208 of the Revenue Act of 1926. This was an error. A gain realized from the liquidation of a partnership is not a capital net gain.

Under Section 208 (a) the term "capital gain" is defined as a gain derived from the "sale or exchange of capital assets." In construing that provision, or similar provisions of other revenue Acts, the courts have uniformly held that the words "sale" and "exchange" are to be given their ordinary meaning and do not refer to other dispositions of prop-

The Government offered evidence to show that if all the yearly gains and losses of the two companies for the period from the date of Frick's death to December 31, 1924, were eliminated from the computation of the gain realized by each partner in 1925, and the remaining profits were taxed at ordinary income rates, the computation would show that A. W. Mellon and R. B. Mellon underpaid their taxes for 1925 in the respective amounts of $81,971.53 and $48,232.62 (R. 587–588). We think this evidence was wrongly excluded, if the

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erty. See *Burnet* v. *Harmel*, 287 U. S. 103; *Berg* v. *Commissioner*, 33 F. (2d) 641 (App. D. C.); *Burkett* v. *Commissioner*, 31 F. (2d) 667 (C. C. A. 8th), certiorari denied, 280 U. S. 565; *Hale* v. *Helvering*, 85 F. (2d) 819 (App. D. C.). There is less reason to apply them to amounts paid to a partner upon dissolution of a partnership. Cf. *Helvering* v. *Smith*, 90 F. (2d) 590 (C. C. A. 2d).

Thus it has been held that the gain realized upon the retirement of a bond is not a gain realized upon the sale or exchange of a capital asset within the meaning of the capital gain provisions. *Watson* v. *Commissioner*, 27 B. T. A. 463; *Fairbanks* v. *United States*, decided by the District Court for the Southern District of California on October 5, 1936, opinion unreported, now pending on appeal in the Circuit Court of Appeals for the Ninth Circuit. The Bureau of Internal Revenue has held that the gain realized from the surrender of a life insurance contract is not a capital gain. G. C. M. 18233, Internal Revenue Bulletin, Vol. XVI, No. 21, p. 5. Cases dealing with liquidating distributions of corporations are not consistent, and are not particularly pertinent here for the reason that the method of taxing such distributions is governed by specific provisions. See, for example, Section 201 (c) of the Revenue Act of 1926.

1925 tax liability was to be considered at all in this proceeding (R. 206–27, 588). But the controlling consideration is that the tax liability of the two Mellons for 1925 has not been finally determined and should not be considered in this proceeding.[29] When these cases are finally settled, the Commissioner will give effect to the decision of the Court in determining what refunds, if any, are due for 1925.

We submit, therefore, that the Government is not precluded from asserting its equitable defense against refunds of the taxes here involved by any proceeding which has been instituted relative to the year 1925.

CONCLUSION

The surviving partners were properly taxed on their distributive shares of the earnings of A. Overholt & Company and West Overton Distilling Company for 1920, including the profits from the sale of whiskey. But even if this Court should hold that the two firms should have been taxed as trusts for 1920, recovery should be denied for the reason that the refunds would go to the personal representatives of those who were responsible for the payment of the tax as trustees or distributees, who

[29] The Government objected to the admission of all evidence concerning 1925 (R. 584).

would have borne the burden of the tax, and who have benefited from its nonpayment.

Respectfully submitted.

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JANUARY 1938.

APPENDIX A

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 200. That when used in this title—

* * * * *

The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate;

* * * * *

SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

(b) The net income shall be computed upon the basis of the the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from

calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226.

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership.

* * * * *

(d) The net income of the partnership shall be computed in the same manner and on the same basis as provided in section 212, except that the deduction provided in paragraph (11) of subdivision (a) of section 214 shall not be allowed.

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the in-

come of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration of settlement of estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

* * * * *

SEC. 224. That every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and ad-

dresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

SEC. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected,

and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows.

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer;

* * * * *

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

Treasury Regulations 45 (1920 Edition):

ART. 321. *Partnerships.*—Partnerships as such are not subject to taxation under the statute, but are required to make returns of income. See section 224 of the statute and articles 411 and 412. Individuals car-

rying on business in partnership are, however, taxable upon their distributive shares of the net income of such partnerships, whether distributed or not, and are required to include such distributive shares in their returns. The net income of a partnership shall be computed in the same manner and on the same basis as the net income of an individual, except that the deduction of contributions or gifts is not permitted. See section 212 and articles 21–26. As to the excess profits tax on partnerships with fiscal years ending in 1918 see section 335 (c).

ART. 322. *Distributive shares of partners.*—The distributive share of the net income of a partnership which a partner is required to include in his return is his proportionate share of the net income of the partnership, either (a) for the taxable year upon the basis of which the partner's net income is computed, or (b), if the partner's net income is computed upon the basis of a taxable year different from that upon the basis of which the net income of the partnership is computed, for the taxable year of the partnership ending within the taxable year upon the basis of which the partner's net income is computed. Amounts earned and distributed to a partner by a partnership after the end of its taxable year and before the end of his corresponding taxable year should be accounted for both by the partnership and by the partner in their returns for their next succeeding taxable year.

ART. 342. *Estates and trusts taxed to fiduciary.*—In the case of (a) estates of decedents before final settlement and of (b) trusts, whether created by will or deed, for accumulation of income, whether for unascertained persons or persons with contingent interests or otherwise, the income is

taxed to the fiduciary as to any single individual, except that from the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary. * * *

ART. 411. *Partnership returns.*—Every partnership must make a return of income, regardless of the amount of its net income. The return shall be on form 1065 (revised) and shall be sworn to by one of the partners. Such return shall be made for the taxable year of the partnership, that is, for its annual accounting period (fiscal year or calendar year as the case may be), irrespective of the taxable years of the partners. See section 218 of the statute and articles 321–327. If the partnership makes any change in its accounting period, it shall make its return in accordance with the provisions of section 226 and article 431. See also article 424.

ART. 412. *Contents of partnership return.*—The return of a partnership shall state specifically (a) the items of its gross income enumerated in section 213 of the statute; (b) the deductions enumerated in section 214, other than the deduction provided in paragraph (11) of subdivision (a) of that section; (c) the amounts specified in subdivisions (a) and (b) of section 216 received by the partnership; (d) the amount of any income, war profits and excess profits taxes of the partnership paid during the taxable year to a foreign country or to any possession of the United States, and the amount of any such taxes accrued but not paid during the taxable year; (e) the names and addresses of the individuals who would be entitled to share in the net income of the partnership if distributed; (f) the amount of the distributive share of such net income

of each such individual; and (g) such other facts as are required by form 1065 (revised). See also sections 222 and 227 and articles 381–384 and 441–448.

ART. 421. *Fiduciary returns.*—Every fiduciary, or at least one of joint fiduciaries, must make a return of income (a) for the individual whose income is in his charge, if the net income of such individual is $2,000 or over if married and living with husband or wife or is $1,000 or over in other cases, or (b) for the estate or trust for which he acts, if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a nonresident alien. The return in case (a) and also in case (b) if the tax is payable by the fiduciary shall be on form 1040 (revised), except that it may be on short form 1040 A (revised) where the net income does not exceed $5,000. The return shall be on form 1041 (revised) in case (b) if the tax is payable by the beneficiaries. In such a case the fiduciary shall include in the return a statement of each beneficiary's distributive share of the net income, whether or not distributed before the close of the taxable year for which the return is made. See section 219 of the statute and articles 341–347. If the net income of a decedent from the beginning of the taxable year to the date of his death was $1,000 or more, if unmarried, or $2,000 or more, if married, the executor or administrator shall make a return for such decedent. See article 305.

ART. 424. *Return by receiver.*—A receiver who stands in the stead of an individual or corporation must render a return of income and pay the tax for his trust, but a receiver of only part of the property of an individual or corporation need not. If the receiver acts for an individual the return shall be on

form 1040 (revised) or 1040A (revised). When acting for a corporation a receiver is not treated as a fiduciary, and in such a case the return shall be made as if by the corporation itself. See section 239 of the statute and article 622. A receiver in charge of the business of a partnership shall render a return on form 1065 (revised). A receiver of the rents and profits appointed to hold and operate a mortgaged parcel of real estate, but not in control of all the property or business of the mortgagor, and a receiver in partition proceedings, are not required to render returns of income. In general, statutory receivers and common law receivers of all the property or business of an individual or corporation must make returns. See also section 256 of the statute and articles 1071–1080.

ART. 547. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind upon dissolution, however they may have appreciated or depreciated in value since their acquisition. See further articles 622 and 1548.

ART. 1521. *Fiduciary.*—"Fiduciary" is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators, and a fiduciary for income tax

purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another as in the case of receivers. A committee of the property of an incompetent person is a fiduciary. See sections 219 and 225 of the statute and articles 341–344 and 421–425.

ART. 1570. *Readjustment of partnership interests.*—When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid. If, however, the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received on distribution. See article 1566. Whenever a new partner is admitted to a partnership, or any existing partnership is reorganized, the facts as to such change or reorganization should be fully set forth in the next return of income, in order that the Commissioner may determine whether any gain or loss has been realized by any partner. See also article 1563.

APPENDIX B

THE SUFFICIENCY OF THE FILING OF THE INFORMATIONAL PARTNERSHIP RETURNS FOR PURPOSES OF COMMENCING THE RUNNING OF THE STATUTE OF LIMITATIONS UPON THE COLLECTION OF INCOME TAXES FROM THE COMPANIES AS TRUSTS

1. Section 250 of the Revenue Act of 1921, c. 136, 42 Stat. 227, provides:

> (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed * * *; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, * * * *Provided further,* That in the case of a false or fraudulent return, with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due * * *.

This was the first express provision with respect to the failure to file a return. By its terms it was made retroactive with respect to returns due under previous acts, *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 459.

In the Revenue Act of 1924, c. 234, 43 Stat. 253, the form of the provision was changed to the following:

> SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> (1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.
>
> * * * * * *

> SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

This form has been retained, practically without change, except for the fact that the Revenue Act of 1928 and the succeeding acts omitted all reference to taxes imposed under a previous title.

2. The decisions of this Court do not discuss the significance of the filing of an informational return, or its sufficiency to start the statute of limitations running. This Court has held only that the statute of limitations is not set in operation by an unverified return, *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245, or by a "tentative return" filed with respect to taxes for 1918 and consisting merely of a statement of the amount of tax believed due, payment of part thereof, and a request for extension of the time for filing the usual return, *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453. In *Zellerbach Co.* v. *Helvering,* 293 U. S. 172, because of an unusual statutory and administrative situation, the Court held that an income and profits tax return filed on July 16, 1921, under the Revenue Act of 1918, was sufficient to set the statute of limitations running, where the subsequent enactment of the Revenue Act of 1921, made retroactive to January 1, 1921, necessitated only a small, easily computable change in the return of the particular taxpayer, and in many cases necessitated no change whatever.

3. All the authorities in the lower courts look strongly to the view that the filing of an informa-

tional return is not sufficient to start the statute of limitations running.

The most lucid and succinct analysis of the statutory provisions may be found in *United States* v. *The National City Bank of New York and Gertrude Vanderbilt Whitney,* 1937 Prentice-Hall Federal Tax Service, Vol. 1, par. 1664, decided November 27, 1937. The bank, as trustee, filed an informational return (form 1041) for 1927, which listed certain items of income paid over to the life beneficiary. Upon the assumption that the trustee should have filed a return on form 1040, and paid a tax as to certain other income derived from the sale of real estate held for the remainderman, the Government brought suit to collect the tax, more than three years after the filing of the informational return. The court, per Judge Patterson, held the informational return insufficient to start the running of the statute of limitations:

> It is plain that when Congress declared in section 277 (a) (1) that "the amount of income taxes imposed by this Act shall be assessed within three years after the return was filed" and that no suit for collection without assessment should be begun after that period, the "return" referred to was a return of income tax imposed by the Act. The words "income taxes imposed by this Act" having already appeared in the opening line, the sense is clear without a repetition of these words after the words "the return." A return that was a mere information return, giving information concerning the tax payable by someone else, could not have been included. This being the case, no broader meaning may be attached to the word "return" in the correlative section 278 (a), to the effect that in case of "failure

> to file a return" the tax may be assessed or sued for at any time. The meaning is that in the event of failure to file a return of income tax imposed by the Act, assessment or suit may be resorted to at any time. It follows that where a trustee who should have filed a return of income tax imposed on him because of undistributed trust income (form 1040) merely filed an information return showing income distributed to others and taxable against them (form 1041), the case is one of "failure to file a return," so far as the tax on the undistributed income is concerned, and suit against the trustee to collect the tax may be commenced at any time.

In this connection see also the approach utilized in Sol. Op. 157, III-2 Cum. Bull. 172, 175, to the effect that an assessment against an estate is not barred where the executors previously filed an informational return on form 1041, but no (tax) return on form 1040:

> The most casual reading of section 250 as a whole convinces one that wherever a "return" is mentioned the reference is to a tax return, not a mere information return, and section 8 of the 1916 Act requires an executor to make a tax return for the estate for which he acts whenever the income of the estate is $3,000 or over. The return required under section 250 (d) is one on which an assessment was intended to be and can be made, as its language shows, and an assessment can not be made on a mere information return.

The same principle has been applied to an informational partnership return. In *McDonnell* v. *United States,* 59 F. (2d) 295, 299, 300 (C. Cls.), certiorari denied, 287 U. S. 648; *Atterbury* v.,

United States, 59 F. (2d) 300 (C. Cls.), a partnership filed for 1917 an informational income tax return (form 1065), but it did not file a return on form 1102 with respect to the excess-profits tax, which a partnership was required to pay as taxpayer. The court held (p. 300) that the partnership—

> was required to file an excess profits tax return, form 1102, and that in the circumstances the filing of the return of income, form 1065, was not a sufficient compliance with the statutes and regulations. * * * Assessment and collection of the tax in question were not, therefore, barred at the time made.

In each of the foregoing cases the taxpayer was acting in the same legal capacity (viz, fiduciary; partnership), whether an informational or taxpayer's return was filed. However, in this case the informational return was filed on the theory that the companies were partnerships, whereas if they had been regarded as trusts, a taxpayer's return would have been filed. The situation is comparable to that of the Roosevelt & Son Investment Fund, which filed for 1927, 1928, 1929 fiduciary returns on form 1041, as a trust which had distributed income. On March 9, 1934, the Commissioner, having ruled that it was an association, assessed the deficiency against it as a taxpayer. The Board of Tax Appeals, relying on its rulings, see *infra,* p. 110, held, one member dissenting, that the filing of the informational return as a trustee started the running of the statute of limitations barring assessment of the fund as an association. On appeal, it was held, *Commissioner* v. *Roosevelt*

& Son Inv. Fund, 89 F. (2d) 706 (C. C. A. 2d), that the informational return was not a tax return adequate to set the statute of limitations running, and so the Commissioner could not appeal to the Second Circuit on the ground that the return of the tax in respect of which the liability arises had been filed in that region. The court said (p. 708):

> The truth is that the information return filed by the respondent was not the return of a tax at all but merely detailed the information with which the tax upon the beneficiaries could be computed. It is immaterial in this respect that such a return has been held to prevent the imposition of a penalty [*Hartford-Connecticut Trust Co.* v. *Bowers,* 34 F. (2d) 128 (C. C. A. 2)], or that it contained all the facts by which a computation of the tax could be arrived at. Section 275 (c) is explicit in its reference to the "return of the tax imposed by this title." That means just what it says and may not be extended to include an information return which in fact is no tax return at all.
>
> An absence of jurisdiction is a corollary to what we have just said. * * *

4. The opposite conclusion, that an informational return is sufficient to start the limitation period running, has been reached by the Board of Tax Appeals. *Estate of F. M. Stearns,* 16 B. T. A. 889; *J. R. Brewer, Administrator,* 17 B. T. A. 704; *Roosevelt & Son Inv. Fund,* 34 B. T. A. 38, *supra.* It appears, however, that these decisions rely almost exclusively on *Abraham Werbelovsky, Executor,* 8 B. T. A. 442, which was not concerned with the adequacy of an informational return, but involved an admitted taxpayer who showed his alleged lack of net income on the wrong form.

Compare *Denman* v. *Motter,* 44 F. (2d) 648 (D. Kan.), dismissed on motion of appellant, 50 F. (2d) 1079 (C. C. A. 10th), where the statute was set in effect by a return made on plain paper by a partnership unable to get a copy of the correct form.

In *Eli Kirk Price, Executor and Trustee,* 23 B. T. A. 1192, fiduciary returns, which did not disclose certain items of income, were held not to preclude an assessment against the estate more than five years later. The Board found the *Werbelovsky* case "clearly distinguishable," and did not advert to the *Stearns* and *Brewer* decisions.

5. The withholding of a limitation period in the event of "failure to file a required return" under the Revenue Act of 1921 was changed to "failure to file a return" in the Revenue Act of 1924. This modification was not commented on by any of the courts construing the later phraseology (*supra,* p. 107 *et seq*). The relevant committee reports describe certain provisions of the 1924 Act as constituting changes from the 1921 Act, describe other provisions containing alterations in form as continuing the substance of the previous provisions, but do not discuss this particular phrase. H. Rep. No. 179, 68th Cong., 1st Sess., p. 26; S. Rep. No. 398, 68th Cong., 1st Sess., p. 32. The change may be attributable to considerations of style and the fact that Section 250 (d) of the 1921 Act was divided up and reorganized into Sections 277 and 278 of the 1924 Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NOS. 144, 145

D. B. HEINER, Individually and as Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania,
Petitioner,

v.

A. W. MELLON, Respondent.

D. B. HEINER, Individually and as Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania,
Petitioner,

v.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, and THE UNION TRUST COMPANY OF PITTSBURGH, Executors of the Estate of R. B. Mellon, Deceased, Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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July, 1937.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Opinions Below.

The opinion of the District Court (R. 148) in the case of *Heiner v. A. W. Mellon* is reported in 14 F. Supp. 424. The opinion of the District Court (R. 163) in the case of *Heiner v. Jennie King Mellon et al.* is unreported but is identical, except for names and amounts, with the opinion in the former case. The cases were consoli-

dated for appeal and the opinion of the Circuit Court of Appeals (R. 709) is reported in 89 F. (2d) 141.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on March 15, 1937 (R. 712-713). The petitions for writs of certiorari were filed June 15, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Counter-Statement of Questions Presented.

1. Is any taxable gain realized during the liquidation of a partnership dissolved by the death of a partner, until the amount received by the partners from the sale of the assets exceeds the cost bases of the respective partnership interests?

2. When a partnership is dissolved by the death of one of the partners, are the surviving partners liquidating trustees and taxable as a separate entity?

3. Can the petitioner maintain a plea of estoppel when it appears that there has been no misrepresentation or concealment of any fact by respondents; that with full knowledge of the facts the Commissioner of Internal Revenue has assessed and petitioner has collected from the taxpayers, taxes on the same income in two different years; that neither the Commissioner of Internal Revenue nor the Federal Government has ever tendered return of the tax for either year; and that the Commissioner and the Government have shifted back and forth from one legal position to another to the detriment of respondents?

Counter-Statement.

On December 12, 1918, A. W. Mellon, R. B. Mellon and H. C. Frick, the only stockholders of A. Overholt

& Co. and West Overton Distilling Company, two corporations, each of which operated a distillery and owned large stocks of whiskey, formed two partnerships under the same names to take over the assets of the corporations. (Fdg. 8, R. 150, 15-19, 321, 365, 369; Ex. 3; R. 351 d). No additional stock of whiskey was to be manufactured or purchased. (Fdg. 13, R. 152).

The partnerships began business January 1, 1919 and were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were thereafter entered into. (Fdgs. 8, 9, R. 151, 321, 335).

Immediately after the dissolution of the partnerships the surviving partners began the liquidation of the two partnerships, and from that time, December 2, 1919, until January 31, 1921, acted as liquidating trustees in respect to the assets and businesses of the two former partnerships. (Fdg. 10, R. 15). In the process of liquidation no distilling operations were carried on and whiskey was sold by certificate until the end of 1920, at which time the surviving partners decided not to sell any more certificates unless they could sell all of the whiskey to some one person or concern. During 1920, bottling and storage operations were carried on as incidental to the sale of whiskey certificates and the withdrawal of the whiskey. (R. 354-55). On January 31, 1921, The Union Trust Company of Pittsburgh was appointed liquidating agent for the partnerships and all the remaining assets were transferred to it for that purpose (R. 19-32, Fdg. 10, R. 151). The distilleries and whiskey were finally sold in the year 1925. (R. 324, 337-38, 353-56).

The surviving partners kept the assets of the partnerships, including cash, separate from their individual interests, treating the same as trust properties, and did not commingle such assets or cash with their own assets or cash (R. 325, 388, admitted in the pleadings and in

evidence; Fdg. 15, R. 152; requested by petitioner, Request 9, R. 630, 654).

The books and records of the individual taxpayers were kept and their income tax returns were filed on the cash receipts and disbursements basis of accounting. (Fdg. 3, R. 149, 319, 333-34). The books and records of the two partnerships were kept on the accrual basis of accounting. (R. 159, 173, 511).

No distribution of any profits and no return of capital was made by the surviving partners or by the liquidating agent to the surviving partners as individuals or to the estate of the deceased partner during the year 1920 or during any year until after final liquidation in 1925. (Fdgs. 12, 14, 18, R. 152-53, 356-58, 366). Liquidation of the two partnerships was finally consummated and distribution was made by the liquidating agent to the surviving partners and to the estate of the deceased partner in the year 1925. (Fdg. 12, R. 152, 323, 337).

Partnership income tax returns for the year 1920 were filed on behalf of the two partnerships in liquidation by R. B. Mellon, one of the surviving partners. The returns disclosed that the partnerships were in liquidation because of the death of Mr. Frick, reported the income realized from bottling, storage and sale of barrels, and computed tax thereon, and also disclosed a computed profit on the sale of whiskey certificates which was not reported as income but claimed to be the proceeds from the conversion of capital assets and not reportable as income until such proceeds exceeded the cost bases to the former partners of their partnership interest. (Exs. 3, 4; R. 351, 352).

On the individual income tax returns filed by the surviving partners for 1920, each took up and returned as income his undistributed share of the reported income of A. Overholt & Co. and West Overton Distilling Company from bottling, storage, etc. (R. 326, 340). No

income from the sale of whiskey certificates was returned by the individuals for 1920.

In 1927 the Commissioner assessed additional taxes for 1920 against the surviving partners, aggregating with interest $202,502.20 against A. W. Mellon and $187,887.17 against R. B. Mellon, which were paid under written protest on April 2 and May 19, 1927, respectively. (R. 320, 335).[1] These additional taxes were assessed on the theory that a taxable profit was realized in 1920 from the sale of whiskey certificates. (R. 327, 340, 387, 388, 395-97). (Fdgs. 5, 6, 7, R. 150).

The sum received from the sale of whiskey certificates by the partnerships in 1920 and prior thereto was less in amount than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon. (Fdg. 23, R. 154).

On or about November 14, 1928, the Commissioner reversed his ruling of 1927 and held that the liquidation of the two partnerships was consummated in 1925, that the reported profits and losses for 1924 should be eliminated, and that income for 1925 should include the difference between the cost values of the partners' interests as of December 2, 1919 and the amounts received in final liquidation, including all reported and alleged profits and losses for the years 1920 to 1924, inclusive. On this basis deficiencies for the year 1925 were accordingly assessed by the Commissioner and paid by the surviving partners. (Fdgs. 19, 20, R. 153-54, 328-31, 341-42, 345; Exs. BB, CC; R. 495, 501). In assessing the tax for 1925, the Commissioner included in income the alleged profit from the sale of whiskey certificates in 1920 on which a tax had previously been assessed by him for the year 1920, and paid by the surviving partners in April and May, 1927, as above stated. (Fdg. 24, R. 155).

---

[1] Payment under written protest was admitted in the pleadings and read into evidence without objection.

Claims for refund of the 1920 tax were filed by the surviving partners on March 19, 1929 (Fdg. 21, R. 154, 331, 346), four days after the Commissioner had issued his final deficiency letter for the year 1925 in which he proposed to assess the tax on all the income from the liquidation in the latter year. (Fdg. 20, R. 154).

The claims for refund of the 1920 tax were rejected on April 6, 1934 (R. 402; Ex. V, R. 479), more than five years after the filing thereof and two years after these suits had been instituted. (Fdg. 22, R. 154).

On July 16, 1931, more than two years after the filing of the claims for refund of the 1920 tax, the Commissioner again reversed his position, and as to the year 1924, included in the tax computation of the surviving partners the profits and losses realized from bottling, storage, etc., during the liquidation of the two former partnerships. (R. 481-82).

Protective claims for refund of income tax for 1925 were filed by both taxpayers on or about May 11, 1932 (Exs. FF, GG; R. 508-10), but the Commissioner, notwithstanding the fact that he has collected taxes on the same income in both 1920 and 1925 has not acted on the claims nor tendered any refund of tax for either year. There is no evidence as to why the claims have not been acted upon and the Court made no finding of fact on this point.

Additional Facts With Respect to Defense of Estoppel.

The question of estoppel arises only in the event that the income in question was taxable in 1920. The Trial Court made no special findings relating particularly to this defense as it held the question to be moot in view of its decision that no taxable income was realized from the sale of whiskey certificates in 1920.

The fact that the partnerships were in liquidation in 1920 was made known to the Commissioner on the

income tax returns filed by the two dissolved partnerships. (Exs. 3, 4; R. 351-52). The returns for both former partnerships and of both the surviving partners were examined and the books of account and the records audited at the same time by the same Revenue Agent, Albert W. Smith, and his reports on all four returns are dated November 8, 1921, Exhibits C, D, K, L. (R. 444-50). These reports on the former partnerships refer to each other. The return filed by A. Overholt & Co. states that it is a "partnership in liquidation," and on a special schedule attached thereto, the following appears:—

> "The partnership of A. Overholt & Co. consisted of A. W. Mellon, R. B. Mellon and Henry C. Frick and was created on December 30, 1918, for the purpose of liquidating the assets of A. Overholt & Co., a Pennsylvania corporation.
>
> "Mr. Frick died on December 4, 1919, and under the laws of the State of Pennsylvania, Messrs. A. W. and R. B. Mellon were, as surviving partners, required to carry on the liquidation of the assets of the copartnership.
>
> "On February 1, 1921, Messrs. Mellon, as liquidating partners, transferred all of the assets, real, personal and mixed of the copartnership, to The Union Trust Company of Pittsburgh, as liquidating agent." (R. 351 d).

The return of West Overton Distilling Company (Ex. 4; R. 352) states, in answer to question 3 (b), that it is "in liquidation."

The Revenue Agent's report on A. Overholt & Co. for 1920 (Ex. K; R. 448) stated that the taxpayer had set aside a portion of profits under the caption of liquidation, claiming it as a return of capital.

The legal point that the surviving partners became as a matter of law liquidating trustees and, as such, taxable as a separate entity, was argued in a brief filed on

November 22, 1932 (Ex. LLL; R. 572), and then only after the Commissioner had refused to act upon the claims for refund for 1925, which were filed as a protective measure. (Exs. FF, GG; R. 507-10).

There was no concealment or misrepresentation of any fact. The Commissioner knew of Mr. Frick's death and had full knowledge that A. W. Mellon and R. B. Mellon were liquidating the former partnerships; he made a settlement with the Frick Estate on the basis that the so-called profits of both former partnerships for the year 1920 did not constitute taxable income in that year, but did constitute taxable income in the year 1925 and the Frick Estate paid the tax on that basis. (Fdg. 16, R. 152, 325-26, 339, 600-15; Ex. 6).

The Commissioner's inconsistent determinations with respect to the net income of A. Overholt & Co. and West Overton Distilling Company during the period of liquidation are respectively set forth in letters written by him as follows:

1. All profit, whether from bottling or otherwise, was taxable income in 1920. (Letters of February 9, 1922; Exs. C, D; R. 444, 446).
2. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of September 14, 1927, Ex. 6; R. 605, Fdg. 16).
3. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of November 14, 1928, R. 328, 341-42, Fdg. 19).
4. All profit was realized upon final liquidation. (Notice of Deficiency for 1925, March 15, 1929, Exs. BB, CC; R. 491, 497, Fdg. 20).
5. Profit on sale of whiskey was realized and taxable in 1920. (Letters dated April 16, 1932, Exs. T and U; R. 475-77; letters dated February 27, 1934 and April 6, 1934, Exs. W and V;

R. 479-80). See also similar letters to A. W. Mellon (R. 401-02).

On or prior to December 31, 1925, and prior to the date of the additional assessments for both 1920 and 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Co. and West Overton Distilling Company were distributed to the surviving partners and the Estate of H. C. Frick, leaving said partnerships w h no assets or property. (R. 390, 398). During the liq dation, various sums of money were loaned by the trustees to the partners and the estate of the deceased partner. These loans were carried on the books of the partnership as bills receivable and repayments were duly credited on the same record. Any balance due on the loans was repaid when the partnership property was sold. The Trial Judge, in his opinion, held that the sums so advanced were loans and were not paid out in distribution of the gains of the partnerships (R. 159).

ARGUMENT.

The Decision of the Court Below Is Not in Conflict With the Decision of the Circuit Court of Appeals for the First Circuit in Earle v. Commissioner, 38 F. (2d) 965.

The *Earle* case holds only that income earned prior to dissolution by death is taxable income. Of course income earned prior to death is always taxable income even though it becomes a capital asset to the estate on death. To be comparable to the *Earle* case, the items in question here would have to be income earned prior to the death of Mr. Frick. Mr. Frick died in 1919 and the alleged income in question accrued in 1920, a different taxable year. The admitted profits at issue in the *Earle* case arose from a sale made on June 14, 1923, prior to the death of a partner who died on July 1, 1923. Later in 1923 all the assets of the partnership were taken over in a non-taxable exchange by a corporation which assumed all the debts. The partnership base became the base of the corporate stock. The facts in the case (practically conclusive on appeal), are set forth in the findings of the Board (15 B. T. A. 668, 669, 670). In the opinion of the Board (Phillips, Member), we find this comment (p. 671):—

> *"It appears that the net income of the partnership * * * was some $70,000, all of which had been earned prior to the death of Eugene V. Earle. The partnership was not only terminated in 1923 by the death of this partner, but its affairs were liquidated in that year by transferring all its assets to a corporation, which assumed all of the obligations and liabilities of the partnership.* This transfer, however, was not of the nature which could give rise to a taxable gain or deductible loss. Section 202,

Revenue Act of 1921. The taxable year of the partnership being the same as that of the partners, the liquidation having been accomplished within the year without gain or loss, and *all of the profits of the year having been accrued and received by the partnership prior to its termination by the death of a partner, there are not here involved those questions which arise where the partnerships and the individual partners have different accounting periods, where losses are sustained during the period of liquidation, or where liquidation is not completed within the taxable year.*" (Italics ours).

The above statement distinguishes the case. All else is *obiter* or involves other questions. The Circuit Court of Appeals took the same view as the Board. There is therefore no conflict of decisions.[1]

No Taxable Income Was Realized in 1920.

The Trial Court found that no taxable gain was realized in 1920 from the sale of whiskey certificates for the reasons:—(1) The partnerships were dissolved by the death of Mr. Frick in 1919, and were in process of liquidation and the whiskey sold in 1920 was a capital asset from which no gain was realized until the proceeds of sale exceeded the cost of the interests of the partners; (2) The surviving partners were trustees with the duty of accounting upon the termination of the liquidation which was not and could not reasonably have been completed in 1920 or in fact until 1925 (Fdg. 14, R. 152-167).

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[1] In the petition for writ of certiorari in the case of *United States v. Grahame Wood et al., Executors of the Estate of George Wood, Deceased* (filed five years after the decision in the *Earle* case above cited) the Solicitor General admitted that the same question was involved in the Wood case as is involved in the instant cases. Certiorari was denied November 25, 1935, 296 U. S. 643.

It held that the question whether or not the surviving partners were taxable as a separate entity, *i. e.*, as trustees, was moot in view of its finding that no taxable gain was realized in 1920 upon the sale of whiskey certificates. (R. 156-62).

The Circuit Court of Appeals held that no gain was realized until such time as each surviving partner and the representative of the estate of the deceased partner respectively received an amount in excess of the cost to him of his partnership interests and of the undistributed net income on which the income tax had been paid; and that profit or loss could not be determined until the proceeds should exceed the base calculated in accordance with Article 1570 of Regulations 45.

The judgments of the District Court are fully supported by the following: (1) The Commissioner's own determinations in 1928 and 1929 that no profit was realized until final liquidation in 1925. (Fdgs. 19, 20, R. 153-154, 328-31; Exs. BB, CC, R. 491, 497). (2) A similar final determination made by the Commissioner with respect to the estate of the deceased partner. (Fdg. 16, R. 152, 325-26, 600-13). (3) Article 1570 of Regulations 45, promulgated under the Revenue Act of 1918 and still in force, which provides:

> "When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid."

Article 1570 of Regulations 45 was first promulgated under the Revenue Act of 1918 and has appeared in all subsequent Regulations, namely: Regulations 62, Article 1570; Regulations 65, Article 1603; Regulations 69, Article 1603; Regulations 74, Article 604; and Regulations 77, Article 604.

This Regulation is not in conflict with any statutory provision relating to the question. It is within the intent of the taxing statute and does no violence to the letter or spirit of the Act. It was construed and applied by the Commissioner himself in accordance with our position in determining and settling the tax against the Estate of H. C. Frick, one of the partners, for the years 1920 and 1925, and in assessing and collecting tax from respondents for the year 1925. It recognizes another instance where tax is deferred. Deferment of tax is not uncommon. It is recognized on long-term contracts, on installment sales, on liquidations of corporations, on reorganizations of corporations and numerous exchanges of property and it was recognized in *Burnet v. Logan,* 283 U. S. 404, 75 L. Ed. 1143.

The statute has been reenacted without change. The Regulation therefore ought not to be disturbed, unless plainly wrong. *Universal Battery Co. v. United States,* 281 U. S. 580, 583, 74 L. Ed. 1051; *Northwest Utilities Securities Corp. v. Helvering,* 67 F. (2d) 619, 621; *Robertson v. Downing,* 127 U. S. 607; *Edwards' Lessee v. Darby,* 12 Wheat. 206; *Brewster v. Gage,* 280 U. S. 327, 74 L. Ed. 457, 462, and cases there cited.

By successive reenactments of the statute without change, the Regulation has become law. *Massachusetts Mutual Life Insurance Co. v. United States,* 288 U. S. 269; *Old Colony R. R. Co. v. Commissioner,* 284 U. S. 552; *Poe v. Seaborn,* 282 U. S. 101; *Wisconsin v. Illinois,* 278 U. S. 367, 413.

Article 71 of Regulations 45 provides that "The term 'gross income' as used in the act does not include those items of income exempted by statute or by fundamental law." *Law of Federal Income Taxation,* Paul & Mertens, Vol. 1, § 5.19. A return of the cost of property or capital invested in property has an exempt status resting in "fundamental law."

The facts in this case are directly within the provisions of Article 1570, and under the Regulation promulgated by the Treasury Department the base for determining gain or loss to respondents was the cost of their partnership interests plus the amount of their share in any undistributed partnership net income on which the income tax had been paid. The sales of certificates in 1920 were not "in the ordinary course of business" as stated in petitioner's brief (p. 6) but were made in partial liquidation of the partnership assets.

The argument that if the decision be allowed to stand, it will constitute a dangerous precedent by affording a "loophole for tax evasion" is unwarranted. There are no facts in the record nor in the findings of the Court to support such a statement. There was no evidence of any intention to avoid payment of a tax, let alone of evasion. The remedy, if any is needed, is a change in the rule established by the regulation and is legislative and not judicial. This argument, here introduced for the first time, is untenable and without merit. The fact is that respondents paid a tax on the same income in two separate years when assessments were made by the Commissioner. Surely an attempt to recover one of the taxes so paid cannot be called "tax evasion." This case turns on its own particular facts and the decision does not present an opportunity either for the avoidance or evasion of taxes by others in the future. There is no principle involved

in this case other than the application of a regulation promulgated by the Commissioner himself.

As Surviving Partners Respondents Were Trustees to Liquidate the Partnerships and Taxable as Such.

Mr. Frick died on December 2, 1919. Under the Pennsylvania statutes, A. W. Mellon and R. B. Mellon, the surviving partners, then became liquidating trustees for the partnerships.

The Uniform Partnership Act is in force in Pennsylvania: Act of March 26, 1915, P. L. 18, Part VI, Section 31. Under Section 31 of the Act, the death of Mr. Frick dissolved the partnerships (Appendix, page 26). See also *Froess v. Froess,* 284 Pa. 369, 373. The partnership agreements contemplated dissolution by the death of a partner (Exs. A, B; R. 15, 19, 321).

The Articles of Agreement appointing the liquidating agent dated January 31, 1931, show that the surviving partners recognized that the partnership was dissolved and in liquidation (Exs. C, D; R. 19, 23).

While under the Act (Sec. 30, appendix page 26) the partnerships were not terminated by Mr. Frick's death, the surviving partners became liquidating trustees with the duty of accounting as trustees on completion of the liquidation. *Froess v. Froess,* 284 Pa. 369; 289 Pa. 69; *Brown's Appeal,* 89 Pa. 139; *Eisenlohr's Estate,* 258 Pa. 431.

As such liquidating trustees, the surviving partners were not required to liquidate and wind up the affairs of the partnerships at once but were entitled to a reasonable time within which to do so and petitioner does not contend that this was not done. There were large contingent liabilities existing in 1920 which prevented distribution at that time. (Fdg. 14, R. 152-167, 369, 373-4, 379).

Distribution could not be made until all debts and liabilities contingent or otherwise had been paid and satisfied, and neither the surviving partners nor the estate of the deceased partner could be taxed until final distribution. Sections 40 and 41, Uniform Partnership Act (Appendix pages 26-27). *Herron v. Wampler,* 194 Pa. 277; *Powell v. Bennett,* 30 N. E. 518 (Ind. 1892); *Lawson v. Dunn,* 57 Atl. 415 (N. J. Equity, 1904); *R. W. Archibald, Jr.,* 4 B. T. A. 483.

But even were we to admit that the partnerships realized taxable income in 1920 from the sale of whiskey certificates, it was income to the liquidating trustees and taxable to them as a separate entity. *Wooley v. Malley,* 30 F. (2d) 73; certiorari denied 279 U. S. 860; *Merchants Loan & Trust Co. v. Smietanka,* 255 U. S. 509, 65 L. ed. 751. Assessment and collection of such a tax is now barred by lapse of time. (R. 398).

There Is No Estoppel.

The partnership returns filed gave every fact necessary to raise the question of a trust and put the Commissioner on notice. The Revenue agents made examinations of the books and records of the partnerships and reported to the Commissioner. He had full information as to the situation. There was no conduct, act, language or silence on the part of respondents amounting to misrepresentation or concealment of material facts. Consequently there can be no estoppel. *Brant v. Virginia Coal & Iron Co.,* 93 U. S. 327, 335; *Southwestern Investment Co.,* 19 B. T. A. 30, and authorities there cited; *Central Market Street Co.,* 25 B. T. A. 490, appeal dismissed by C. C. A. 3rd, Nov. 11, 1933.

Furthermore there can be no estoppel where both parties labor under a mutual mistake of law. The Commissioner knew that Mr. Frick had died and that the partnerships were in liquidation. He chose to treat the

surviving partners, acting as liquidating trustees, and the estate of the deceased partner as members of a continuing partnership, and assessed and collected taxes on that basis. He is chargeable with knowledge of the law and, with knowledge of the facts, it is his duty to make his own interpretation of it. He is required to investigate, examine and audit returns and determine the correct tax. He has no right to rely on a taxpayer's statement or understanding or position as to the law of the case. *Tidewater Oil Co.*, 29 B. T. A. 1208; *Helvering v. Brooklyn City Railroad Co.*, 72 F. (2d) 274; *Glavey v. United States*, 182 U. S. 595; *United States v. Andrews*, 240 U. S. 90; *Dixon County v. Field*, 111 U. S. 83.

In *Helvering v. Salvage*, 297 U. S. 106, this Court said:

> "Further, that the failure to disclose 1922 taxable gain apparently resulted from an innocent mistake of law; there was no false representation of fact; nothing gave support to the claim of estoppel."

The taxpayer does not estop himself by failure to assert his full rights. *Bowers v. New York Trust Co.*, (C. C. A. 2) 9 Fed. (2d) 548, 551, and the form of return used is immaterial if the taxpayer acts in good faith and makes full disclosure. *Hartford Trust Co. v. Eaton*, (C. C. A. 2) 34 Fed. (2d) 128.

In order to assert the claim of estoppel, the petitioner must prove that he was misled by his reliance on the conduct of the other party to change his position to his own detriment. This he cannot do in the present case. Neither the Commissioner nor the petitioner relied on any representation by the respondents. Both were in complete possession of the facts, there was no misrepresentation or concealment and the change of position by the Commissioner was not made in reliance

on the position taken by the appellees, but on the contrary was directly opposite to their position. When in 1928 and 1929 he determined that the 1920 income should be taxed in 1925 as capital gain, he was changing to the position originally taken by the taxpayers when the returns for 1920 were filed, with which position he refused to agree at that time and on the contrary required the payment of an additional tax for that year. He never changed his position as the result of any position taken by the respondents, either as a matter of fact or of law. He is the author of his own misfortune and cannot escape the consequences by now attempting to cast the burden upon the respondents. If the Commissioner, after collecting a tax on identical income in two years, had not changed his position and attempted, contrary to his duty and the exercise of good faith, to collect and retain these taxes for both years, respondents would not have raised the question that the income, if any, in 1920 should have been taxed to the liquidating trustees as separate taxable entities.

The equities are all with the respondents. The Commissioner, having collected tax on the same income in two years, and refusing to refund the tax for either year, is not in a position to raise the defense of estoppel when respondents say that the tax for 1920 should have been assessed against the liquidating trustees. He cannot disaffirm liability to refund the 1920 tax while retaining the benefits of the collection in 1925, particularly when the respondents have accepted the determination of the Commissioner that the income in question was taxable in 1925. The claims for refund of the 1920 tax were filed four days after this determination and show such acceptance. (Exs. 1, 2; R., 349-50). Moreover, the Commissioner did not revert to his original position that taxable profits were realized in 1920 until after this suit

was brought. It was then too late for him to do so. *Ohio & Mississippi Railway Co. v. McCarthy,* 96 U. S. 258, 268, 25 L. ed. 693, 696.

The Case of Stone v. White, Decided by This Court on May 24, 1937, Is Clearly Distinguishable From the Present Case.

The decision in *Stone v. White* was based solely upon equitable principles, the Court saying that there was only one tax due and the question was merely whether the tax should be paid by the trustee or by the beneficiary.

In the present case, a tax on the same income has been paid twice by respondents, due to two different assessments made by the Commissioner on the same income at different times and for different years. In *Stone v. White* an effort was being made to avoid payment of any tax on the income, either by the trustees or by the beneficiary.

In the present case, there is no identity of interest between the trustee and the *cestui que trust* as there was in *Stone v. White,* for the respondents as surviving partners were not entitled to all the income of the trust. Cf. *Sewell v. United States* decided by the Court of Claims, June 7, 1937, 374 C. C. H. ¶ 9374. The respondents are not the "apparent" as well as the "real" taxpayers as stated in petitioner's brief (p. 22). The Frick Estate was the owner of a one-third interest in the partnerships and hence the beneficiary to the extent of one-third of the assets, income and proceeds of sale. Moreover the Frick Estate is now out of the picture, a settlement having been made with it by the Commissioner in 1927 and the entire estate was thereafter distributed. Therefore any tax now assessed on the trust would have

to be paid by the two remaining partners, without contribution from the estate.

In *Stone v. White,* this Court said:

> "No injustice is done to the trustees or the beneficiary by withholding from the trustees money which in equity is the beneficiary's and which the Government received in payment of the tax which was hers to pay. A single error on the part of the taxing authorities, excusable in view of persistent judicial declaration, has caused both the underassessment of one taxpayer and the overassessment of the other."

This quotation does not apply to the present case, as an injustice will be done to the surviving partners as trustees if they are not permitted to recover the tax paid in 1920 and consequently to settle the tax claim on the same basis as the Frick Estate, namely—that the income was taxable in 1925. Nor does the reference to the error of the taxing authorities being excusable in view of judicial declarations, apply to the present case as neither the petitioner nor the Commissioner claims to have relied on any decision of any court. With full knowledge of the facts, they changed their position twice and assessed a tax on the same income in two different years, placing a double tax burden on the respondents. In this instance the taxing authorities are to blame and not the respondents as the double payment was due to the double assessment; they are the sole cause of the situation; and if respondents are not entitled to recover, there will be an unjust enrichment to the Government, which has at *all times declined and still declines to refund or tender refund of the tax, paid on the same income, either for 1920 or for 1925* although in justice and equity a refund should be made for one of the years. *Bull v. United*

States, 295 U. S. 247. The running of the Statute of Limitations in this case was not due to any fault of the respondents but solely to the delay of the taxing authorities in making up their minds as to the year in which the income was taxable, the record showing that the claim for refund of the 1920 tax, for which these suits were brought, was not filed until after the Commissioner assessed a tax for 1925 on the same identical income and was not rejected until two years after the present suits were instituted. The equities in this case are all on the side of the respondents and the principles stated in *Stone v. White* support their position.

The Findings of the Court Which Are Questioned by Petitioner Are Fully Supported by the Evidence.

Finding 24 (R. 155, 169) that the same profits have been taxed in both 1920 and 1925 is supported by direct evidence. Paragraph 19 of the statements of claim, not being denied by the affidavits of defense, was read in evidence *without objection* from petitioner. This stated clearly that the income was taxed in 1920. (R. 327, 340). Paragraph 28 of the statements of claim, not being denied by the affidavits of defense, was read and admitted in evidence, the only objection by petitioner being that the paragraph was irrelevant and immaterial. That paragraph states that the same income, $281,779.95 and $52,814.28 of A. Overholt & Co. and West Overton Distilling Company, respectively, was included in taxable income of each respondent for the year 1920 and again for the year 1925. (R. 332, 347).

Finding 23 (R. 154, 169) that the base exceeded the alleged profit in 1920 is based on the Commissioner's own determination. The alleged profit from the sale of whiskey certificates in 1920, as computed and taxed by

the Commissioner to each of the surviving partners for that year was $233,429.21 from A. Overholt & Co. (R. 387), and $46,853.73 from West Overton Distilling Company (R. 388). The cost basis of each former partner's interests in the partnerships was determined by the Commissioner to be $990,775.53 and $60,505.66, respectively (Exhibits BB, CC, R. 495-96, 501-02). The petitioner introduced no evidence to controvert those figures and they stand unchallenged as direct support for the Court's findings.

Conclusion.

The judgments in the present cases are supported by special findings, and the special findings are supported by ample evidence; there are no conflicts of decisions; the judgments follow a Regulation of many years standing; there is no question of great public importance and no question involving the constitutionality of any act of Congress.

THEREFORE, it is respectfully submitted that the petition for writs of certiorari should be denied.

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REED, SMITH, SHAW & MCCLAY,
Of Counsel.

July, 1937.

APPENDIX.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

"Sec. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

"The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnerships."

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

"(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

"(3) Income held for future distribution under the terms of the will or trust; and

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

"(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *"

"Sec. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a non-resident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable

him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

"Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals."

"Sec. 200. That when used in this title—

* * *

"The term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate; * * *"

Treasury Regulations 45:

"Art. 1570. Readjustment of partnership interests.—When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid. If, however, the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received on distribution. See article 1566. Whenever a new partner is admitted to a partnership or any existing partnership is reorganized, the facts as to such change or reorganization should be fully set forth in the next return of income, in order that the Commissioner may determine

whether any gain or loss has been realized by any partner. See also article 1563."

"Art. 1521. *Fiduciary.*—'Fiduciary' is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors and administrators, and a fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another as in the case of receivers. A committee of the property of an incompetent person is a fiduciary. See sections 219 and 225 of the statute and articles 341-344 and 421-425."

Uniform Partnership Act (Act of March 26, 1915, P. L. 18, Purdon's Pa. St. Ann. Title 59):

"Section 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

"Section 31. Dissolution is caused:

* * *

"(4) By the death of any partner;

* * *

"Section 33. Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership.

* * *

"Section 40. In settling accounts between the partners after dissolution, the following rules shall

be observed, subject to any agreement to the contrary;

* * *

"(b) The liabilities of the partnership shall rank in order of payment, as follows:

"I. Those owing to creditors other than partners,

"II. Those owing to partners other than for capital and profits,

"III. Those owing to partners in respect of capital,

"IV. Those owing to partners in respect of profit.

* * *

"Section 41.

* * *

"(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

NOS. 144 AND 145.

D. B. HEINER, Individually and as Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

PAUL MELLON, DAVID K. E. BRUCE, and DONALD D. SHEPARD, Executors of the Estate of A. W. MELLON, Deceased, Respondents.

D. B. HEINER, Individually and as Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

JENNIE KING MELLON, RICHARD KING MELLON, SARAH MELLON SCAIFE, and THE UNION TRUST COMPANY OF PITTSBURGH, Executors of the Estate of R. B. MELLON, Deceased, Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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February, 1938.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. When a partnership is dissolved by the death of a partner, is any taxable gain realized by the partners during its liquidation until the amount received by the respective partners from the sale of assets exceeds the cost bases of the respective partnership interests?

2. When a partnership is dissolved by the death of one of the partners, do the surviving partners become liquidating trustees and taxable as a separate entity?

3. Can the petitioner maintain an equitable defense in the nature of a plea of estoppel when there has been no misrepresentation or concealment of any fact by respondents; that with full knowledge of all facts the Commissioner of Internal Revenue has assessed and petitioner has collected from the taxpayers taxes on the same income in two different years; that neither the Commissioner of Internal Revenue nor the Federal Government has ever tendered return of the tax for either year; and that the Commissioner has shifted back and forth from one legal position to another to the detriment of respondents?

COUNTER-STATEMENT.

On December 12, 1918, A. W. Mellon, R. B. Mellon and H. C. Frick, the only stockholders of A. Overholt & Co. and West Overton Distilling Company, two corporations, each of which had been engaged in the business of distilling whiskey and had on hand large stocks of whiskey, formed two partnerships under the same names to take over the assets of the corporations. (Fdg. 8, R. 150, 15-19, 321, 365, 369; Ex. 3; R. 351 d). No additional stock of whiskey was to be manufactured or purchased. (Fdg. 13, R. 152).

The partnership agreements provided in part (R. 44):

> "In case of the dissolution of the firm by death of one or more of the partners, the remaining member or members shall have full power and authority to appoint such person or persons (including incorporated companies) as liquidating agent, with such power and authority to wind up and liquidate the affairs of said partnership as to such surviving partner or partners shall seem advisable."

The partnerships began business January 1, 1919, and were dissolved by the death of Mr. Frick on December 2, 1919. No new partnership agreements were thereafter entered into. (Fdgs. 8, 9, R. 151, 321, 335).

Immediately after the dissolution of the partnerships the surviving partners, A. W. Mellon and R. B. Mellon, who will be hereinafter referred to as the "respondents," began the liquidation of the two partnerships, and from that time, December 2, 1919, until January 31, 1921, acted as liquidating trustees in respect to the assets and businesses of the two former partnerships. (Fdg. 10, R. 151). In the process of liquidation no distilling operations were carried on and whiskey was sold by certificate until the end of 1920, at which time the surviving partners decided not to sell any more certificates unless they could sell all of the whiskey to some one person or concern. During 1920, bottling and storage operations were carried on as incidental to the sale of whiskey certificates and the withdrawal of the whiskey. (R. 354-55). On January 31, 1921, The Union Trust Company of Pittsburgh was appointed liquidating agent for the partnerships and all the remaining assets were transferred to it for that purpose. (R. 19-32, Fdg. 10, R. 151). The distilleries and whiskey were finally sold in the year 1925. (R. 324, 337-38, 353-56).

At the time of Mr. Frick's death, December 2, 1919, and during the period of liquidation from 1919 to 1925, there were debts and large contingent liabilities outstanding against the partnerships and no distribution of assets could have legally been made either by the liquidating trustees or by the liquidating agent later appointed by them, until the debts and contingent liabilities had been released, paid or satisfied. (Fdg. 14, p. 152, Ex. 2; R. 350 and R. 369-79).

The surviving partners kept the assets of the partnerships, including cash, separate from their individual interests and did not commingle such assets or cash with their own assets or cash. (R. 325, 388, admitted in the pleadings and in evidence; Fdg. 15, R. 152; finding requested by petitioner, Request 9, R. 630, 654).

The books and records of the individual taxpayers were kept and their income tax returns were filed on the cash receipts and disbursements basis of accounting. (Fdg. 3, R. 149, 319, 333-34). The books and records of the two partnerships were kept on the accrual basis of accounting. (Opinion of Court, R. 159, 173).

No distribution of any profits and no return of capital was made by the surviving partners or by the liquidating agent to the surviving partners as individuals or to the estate of the deceased partner during the year 1920 or during any year until after final liquidation in 1925 when the partnership assets were sold to outside parties. (Fdgs. 12, 14, 18, R. 152-53, 356-58, 366). Liquidation of the two partnerships was finally consummated and distribution was made by the liquidating agent to the surviving partners and to the estate of the deceased partner in the year 1925. (Fdg. 12, R. 152, 323, 337).

Income tax returns for the year 1920 were filed on behalf of the two partnerships in liquidation by R. B. Mellon, one of the surviving partners, on partnership forms. The returns disclosed that the partnerships were in liquidation because of the death of Mr. Frick, reported the income realized from bottling, storage and sale of barrels, and computed tax thereon, and also disclosed a computed profit on the sale of whiskey certificates which was not reported as income but claimed to be the proceeds from the conversion of capital assets and not reportable as income until such proceeds exceeded the cost

bases to the former partners of their partnership interest. (Exs. 3, 4; R. 351, 352).

On the individual income tax returns filed by the surviving partners for 1920, each took up and returned as income his undistributed share of the reported income of A. Overholt & Co. and West Overton Distilling Company from bottling, storage, etc. (R. 326, 340) in the amount of $48,350.75 for A. Overholt & Co. and $5,960.55 for West Overton. (Fdg. 17, p. 153). No part of the proceeds from the sale of whiskey certificates was returned by the individuals for 1920. However the Commissioner increased the amounts so returned by each partner to $281,779.95 for A. Overholt & Co. and $52,814.28 for West Overton, on the theory that a taxable profit was realized in 1920 from the sale of whiskey certificates. (R. 327, 340, 387, 388, 395-97). (Fdgs. 5, 6, 7, R. 150).

In 1927 the Commissioner assessed additional taxes for 1920 against the surviving partners, aggregating with interest $202,502.20 against A. W. Mellon and $187,887.17 against R. B. Mellon, which were paid under written protest on April 2 and May 19, 1927, respectively. (R. 320, 335).

The alleged profit from the sale of whiskey certificates for 1920, as computed and taxed by the Commissioner (A. Overholt & Co., $233,429.21, R. 387, West Overton Distilling Company, $46,853.73, R. 388), did not exceed the cost bases of the former partners' interests in the partnerships, which were $990,775.53 and $60,505.66, respectively. (Fdg. 23, R. 154, Exs. BB. CC; R. 495-96, 501-02).

After the Commissioner had assessed and collected the alleged additional tax for 1920, he, on or about November 14, 1928, reversed his ruling of 1927 and held that the liquidation of the two partnerships was consum-

mated in 1925, that the reported profits and losses for 1924 should be eliminated, and that taxable income for 1925 should include the difference between the cost values of the partners' interests as of December 2, 1919, and the amounts received in final liquidation, including all reported and alleged profits and losses for the years 1920 to 1924, inclusive. On this basis deficiencies for the year 1925 were accordingly assessed by the Commissioner and paid by the surviving partners on June 13, 1929. (Fdgs. 19, 20, R. 153-54, 328-31, 341-42, 345; Exs. BB, CC, FF; R. 495, 501, 508 a). In assessing the tax for 1925, the Commissioner included in income the alleged profit from the sale of whiskey certificates in 1920 on which a tax had previously been assessed by him for the year 1920, and paid by the surviving partners in April and May, 1927, as above stated. (Fdg. 24, R. 155).

The Commissioner has twice collected a tax on the identical income by including it first as income for the year 1920 and later as income for the year 1925. (R. 332).

The Commissioner determined and settled the income tax liability of the Estate of Henry C. Frick, the deceased partner, for the years 1920 and 1925 by holding that the so-called profits of A. Overholt & Co. and West Overton Distilling Company for the year 1920 did not constitute taxable income in that year but did constitute taxable income in the year 1925, the year in which final distributions and liquidations were made, and the estate of the deceased partner paid the tax on that basis. (R. 325-26, 339, 600-15). This settlement was first discussed in a letter from the Bureau of Internal Revenue dated December 14, 1927 (Ex. 6; R. 605), and was finally made in 1928. The contents of the said letter were communicated to the attorney for the surviving partners, and the Commissioner's representatives in Washington

were advised that such a ruling would be satisfactory to the surviving partners and a similar ruling could be made as to them. (R. 604-610).

Claims for refund of the 1920 tax were filed by the surviving partners on March 19, 1929 (Fdg. 21, R. 154, 331, 346), four days after the Commissioner had issued his final deficiency letter for the year 1925 in which he proposed to assess the tax on all the income from the liquidation in the latter year. (Fdg. 20, R. 154).

The claims for refund of the 1920 tax were not rejected until April 6, 1934 (R. 402; Ex. V, R. 479), more than five years after the filing thereof and two years after these suits had been instituted. (Fdg. 22, R. 154).

On July 16, 1931, more than two years after the filing of the claims for refund of the 1920 tax, the Commissioner again reversed his position, and as to the year 1924, included in the taxable income of the surviving partners the so-called operating profits and losses realized from bottling, storage, etc., during the liquidation of the two former partnerships. (R. 481-82).

Protective claims for refund of income tax for 1925 were filed by both taxpayers on or about May 11, 1932 (Exs. FF, GG; R. 508-10), but the Commissioner, notwithstanding the fact that he has collected taxes on the same income in both 1920 and 1925 has not acted on the claims nor tendered any refund of tax for either year. There is no evidence as to why the claims have not been acted upon and the Court made no finding of fact on this point.

The District Court entered judgments in favor of the respective plaintiffs, holding that the receipts from the sale of certificates in 1920 were not taxable as profits in that year but constituted a sale of capital assets and were taxable on final liquidation in 1925. These judg-

ments were affirmed by the Circuit Court of Appeals for the Third Circuit.

Additional Facts With Respect to the Equitable Defense.

No question as to the equitable defense of petitioner arises unless the Court should determine that the alleged income in question was taxable in 1920. The Trial Court made no special findings relating particularly to this defense as it held the question to be moot in view of its decision that no taxable income was realized from the sale of whiskey certificates in 1920.

The fact that the partnerships were in liquidation in 1920 was made known to the Commissioner by the income tax returns filed by the two dissolved partnerships for that year. (Exs. 3, 4; R. 351-52). The returns for both former partnerships and of both the surviving partners were examined and the books of account and the records audited at the same time by the same Revenue Agent, Albert W. Smith, and his reports on all four returns are dated November 8, 1921. (Exs. C, D, K, L; R. 444-50). These reports on the former partnerships refer to each other. The return filed by A. Overholt & Co. leaves blank the answer to the questions stated on the first sheet, to-wit: "Kind of Business" and "State Whether Partnership or Corporation," and stated that it is a "partnership in liquidation," and on a special schedule attached thereto, the following appears:

> "The Partnership of A. Overholt & Co. consisted of A. W. Mellon, R. B. Mellon and Henry C. Frick and was created on December 30, 1918, for the purpose of liquidating the assets of A. Overholt & Co., a Pennsylvania corporation.
>
> "Mr. Frick died on December 4, 1919, and, under the laws of the State of Pennsylvania, Messrs. A.

W. and R. B. Mellon were, as surviving partners, required to carry on the liquidation of the assets of the copartnership.

"On February 1, 1921, Messrs. Mellon, as liquidating partners, transferred all of the assets, real, personal and mixed of the copartnership, to The Union Trust Company of Pittsburgh, as liquidating agent." (R. 351 d).

The return of West Overton Distilling Company (Ex. 4; R. 352) stated in answer to question 3 (b), that it is "in liquidation."

The Revenue Agent's report on A. Overholt & Co. for 1920 (Ex. K; R. 448) stated that the taxpayer had set aside a portion of profits under the caption of liquidation, claiming it as a return of capital.

The legal point that the surviving partners became as a matter of law liquidating trustees and, as such, taxable as separate entities, was argued in a brief filed on November 22, 1932 (Ex. LLL; R. 572), and then only after the Commissioner had refused to act upon the claims for refund for 1925, which were filed as a protective measure. (Exs. FF, GG; R. 507-10).

There was no concealment or misrepresentation of any fact. The Commissioner knew of Mr. Frick's death and had full knowledge that A. W. Mellon and R. B. Mellon were liquidating the former partnerships; he made a settlement with the Frick Estate on the basis that the so-called profits of both former partnerships for the year 1920 did not constitute taxable income in that year, but did constitute taxable income in the year 1925, and the Frick Estate paid the tax on that basis. (Fdg. 16, R. 152, 325-26, 339, 600-15; Ex. 6).

The Commissioner's inconsistent determinations with respect to the net income during the period of liqui-

dation of A. Overholt & Co. and West Overton Distilling Company are respectively set forth in letters written by him as follows:

1. All profit, whether from bottling or otherwise, was taxable income in 1920. (Letters of February 9, 1922; Exs. C, D; R. 444, 446).
2. No profit, whether from bottling or otherwise, was realized until final liquidation. (Frick Estate ruling—Letter of September 14, 1927, Ex. 6; R. 605, Fdg. 16).
3. No profit, whether from bottling or otherwise, was realized until final liquidation. (Letter of November 14, 1928, as to 1924, R. 328, 341-42, Fdg. 19).
4. All profit was realized upon final liquidation as capital net gain. (Notice of Deficiency for 1925, March 15, 1929, Exs. BB, CC; R. 491, 497, Fdg. 20).
5. Profit on sale of whiskey was realized and taxable in 1920. (Letters dated April 16, 1932, Exs. T and U; R. 475-77; letters dated February 27, 1934, and April 6, 1934, Exs. W and V; R. 479-80). See also similar letters to A. W. Mellon (R. 401-02).

The Commissioner did not reverse his determination that all profit was realized and taxable upon final liquidation in 1925 until after the praecipes for summons had been issued in the instant cases, nor did he actually disallow the claims for refund until approximately two years after the filing of the praecipes herein and after the statements of claim had been filed in the instant cases.

The Commissioner has not acted on the claims for refund of income tax for the year 1925 filed by the taxpayers, nor has he tendered any refund of tax for either

the year 1920 or the year 1925 or given to respondents any reason for his failure to act or make tender.

On or prior to December 31, 1925, and prior to the date of the additional assessments for both 1920 and 1925, all of the moneys, properties and assets of whatever nature of A. Overholt & Co. and West Overton Distilling Company were distributed to the surviving partners and the Estate of H. C. Frick, leaving said partnerships with no assets or property. (R. 390, 398). During the liquidation, various sums of money were loaned by the trustees to the partners and the estate of the deceased partner. These loans were not in proportion to the partnership interests, were carried on the books of the partnership as bills receivable, and repayments were duly credited to the same account. Any balance due on the loans was repaid when the partnership property was sold. The Trial Judge, in his opinion, held that the sums so advanced were loans and were not paid out in distribution of the gains of the partnerships (R. 159). In his many tax determinations the Commissioner has never taken the position that these loans were taxable as distributions of profits.

Petitioner contends the two partnerships continued in existence as partnerships during 1920 and that the surviving partners were not taxable as trustees, separate taxable entities. The District Court held that whether or not appellees were taxable as separate entities, *i. e.*, trustees, was moot in view of the fact that no taxable gain was realized in 1920 upon the sale of whiskey certificates. (R. 174-76). The Circuit Court of Appeals, in affirming the lower court, held there was no basis for applying the doctrine of either legal or equitable estoppel as there was at most a mutual mistake of law.

SUMMARY OF ARGUMENT.

The two partnerships were dissolved by the death of Mr. H. C. Frick on December 2, 1919, and thereafter until all the assets were sold in 1925 no business was carried on except that incidental to the conversion of the assets of the dissolved partnerships into cash and the payment of the partnerships' debts and obligations. Upon the dissolution of the partnerships by the death of Mr. Frick the interests of the partners became capitalized. No taxable income was realized by the surviving partners from the sale of whiskey certificates during the year 1920, as these certificates did not constitute stock in trade but were capital assets, and the proceeds of such sales did not constitute taxable income until the amount received therefrom exceeded the cost base of the partners' interests. Article 1570 of Treasury Regulations 45 promulgated under the Revenue Act of 1918 so provides. It has been incorporated in subsequent Regulations and the provisions of the act under which it was promulgated have been reenacted in subsequent acts. The Regulation, therefore, has the force and effect of law. The deferment of the realization of taxable income is a well recognized concept of the theory of income taxation. It does not create evasion or avoidance but merely postponement, and does not distort either a taxpayer's income or the revenues of the Government.

The Commissioner having determined that the interests of Mr. Frick in the partnerships were taxable in 1925 and having assessed and collected a tax on that basis in the year of final liquidation and having also determined that the interests of respondents in the two partnerships were likewise taxable in 1925 and having assessed and collected a tax on that basis, he cannot now claim that the respondents realized taxable income

in 1920 on the sale of the capital assets of dissolved partnerships in liquidation.

In no event can it be determined whether taxable gain was realized or loss sustained until liquidation is complete, as all the debts and obligations of the partnerships and the expenses of liquidation must be paid before any distribution can be made to the surviving partners or to the estate of a deceased partner.

Findings of fact concurred in by two lower courts will be accepted unless clear error is shown. The findings of the lower courts that the cost base had not been recovered in 1920 is supported by the evidence. The ultimate fact having been found, recital by the court of circumstantial or evidentiary facts is not required.

The death of Mr. Frick dissolved the partnerships and the surviving partners became, by operation of law, liquidating trustees of the partnerships, with a duty to account as trustees on completion of the liquidation. As such trustees they were not required to complete the liquidation immediately but were entitled to a reasonable time within which to do so. No distributions could have been made by the liquidating trustees until all debts and liabilities, contingent or otherwise, had been paid or satisfied or other provision made therefor.

If this Court should consider that taxable income was realized in 1920 from the sale of whiskey certificates by the dissolved partnerships in liquidation, judgment should be affirmed on the ground that the tax, if any, should have been assessed against and paid by the liquidating trustees as separate taxable entities and not by the surviving partners as individuals or as beneficiaries of the trusts. The Revenue Act of 1918 sets up a comprehensive plan for the taxation of the income of estates

or of any kind of property held in trust and it covers the fiduciary of a trust created by operation of law as well as the fiduciary of an express trust. The term "fiduciary" as defined in section 200 of the act is broad enough to cover every conceivable type of fiduciary, including surviving partners liquidating a partnership dissolved by death.

The taxing authorities had full information from the returns and from the examinations and audits of the records of the dissolved partnerships and of the surviving partners of the fact that Mr. Frick had died and that the partnerships had been dissolved and were in liquidation. The Commissioner was bound to assess the tax correctly. Assessment and collection of the tax against the liquidating trustees as separate taxable entities are barred by the statute of limitations. That fact was expressly pleaded by petitioner, admitted by respondents' reply and read into evidence. Therefore, the question is not before this Court since the United States is bound by the admissions of its counsel.

The Commissioner having had full information as to all necessary facts, the respondents are not estopped to contend that the tax for 1920, if any was due, was payable by the liquidating trustees as separate taxable entities and not by the surviving partners as individuals. The Commissioner assessed and collected a tax against the individuals on alleged profits for the year 1920 and again assessed and collected a tax on the same alleged profits for the year 1925 in which year liquidation was completed, and has refused to refund either tax. The present case is clearly distinguishable from *Stone v. White*, 301 U. S. 532, on which petitioner strongly relies.

The Commissioner did not rely on the returns filed by the partners which assumed that the tax was payable in the year of final liquidation, but assessed and collected a tax on the alleged profits in the year 1920, later reversed his position and assessed and collected a tax on the same profits for the year 1925, and again after suit was brought, returned to his first position and claimed that the tax was properly assessed and collected for the year 1920. The Commissioner cannot claim to have been misled by reliance on the conduct of the surviving partners as he not only did not rely upon it but made his assessments directly contrary to the position taken by the respondents in their returns. There was at most a mutual misunderstanding of the law as to the taxable liability of the surviving partners and the liquidating trustees, and where both parties labor under a mistake of law there is no estoppel. The Government cannot avail itself of the defense of estoppel, a pure equitable defense, when taxes have been assessed and collected on the same identical income in two separate years and no refund or tender of refund has been made for either year. The equities are all with respondents.

ARGUMENT.

I.

No Taxable Gain Was Realized in 1920 on the Sale of Whiskey Certificates by the Dissolved Partnerships in Liquidation.

The District Court found that no taxable gain was realized in 1920 from the sale of whiskey certificates for the reasons: (1) The partnerships were dissolved by the death of Mr. Frick, were in process of liquidation during that year and the whiskey sold was a capital asset from which no gain was realized until the proceeds of sale exceeded the cost of the interests of the partners; and (2) The surviving partners were trustees with the duty of accounting upon the termination of the liquidation, which was not and could not reasonably have been completed in 1920.

Respondents contend, and the lower courts held, that all the disputed items were capital; there was no way to determine whether any part thereof was gain until the dissolution process was complete; and that these items did not become a part of the profits until the final liquidation in 1925. The petitioner collected the tax on the final wind-up of the partnerships in 1925 as contemplated by the Commissioner's long-standing regulations, i. e., the individual partner's cost over the amount realized through liquidation.

In support of the District Court's findings and conclusions we cite the following law and evidence:

(1) Article 1570 of Regulations 45, first promulgated under the Revenue Act of 1918 and still in force, which provides:

"When a partner retires from a partnership, *or it is dissolved,* he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid." (Italics ours).

(2) The Commissioner's own determinations in 1928 and 1929 that no profit was realized until final liquidation in 1925. (R. 328-31; Exs. BB, CC, R. 491, 497).

(3) A similar determination and settlement made by the Commissioner with respect to the estate of Mr. Frick, the deceased partner. (R. 325-26, 600-13).

Article 1570, which was first promulgated under the Revenue Act of 1918, has appeared in all subsequent Regulations as follows: Regulations 62, Article 1570; Regulations 65, Article 1603; Regulations 69, Article 1603; Regulations 74, Article 604; and Regulations 77, Article 604.

Article 71 of Regulations 45 provides that "The term 'gross income' as used in the act does not include those items of income exempted by statute or by fundamental law." A return of the cost of property or capital invested in property has an exempt status resting in "fundamental law." *Law of Federal Income Taxation, Paul & Mertens,* Vol. 1, § 5.19.

There is no question that the death of Mr. Frick dissolved the partnerships. This is admitted by peti-

tioner. (Brief, p. 32). Therefore, when Mr. Frick died, the surviving partners and the estate of Mr. Frick came within the provisions of Article 1570, and under the Regulation promulgated by the Treasury Department the base for determining gain or loss to them was the cost of their partnership interests plus the amount of their share in any undistributed partnership net income on which the income tax had been paid. The base is not in dispute as the respondents have accepted the Commissioner's figure of $990,755.53. (Exs. BB, CC). Their gain or loss was to be measured by the difference between the price received for their interests and the base.

The petitioner argues that the income tax is an annual tax and cannot be postponed. Therefore, he would apply the unit cost rule to the sale of whiskey certificates. The unit cost basis is generally used in determining the profits of a going business, and in connection with sales and exchanges made in the ordinary course of business, but it is not a conclusive rule nor is it founded upon any specific statutory provision, and it must give way to fundamental law. The unit cost basis is a rule of accounting designed to reflect correctly the income of a going business but should not be applied indiscriminately. In cases, such as installment sales and liquidation of capital assets, the rule cannot be applied so as properly to reflect current income. The Commissioner recognized this principle in the case of partnership assets being liquidated upon dissolution of a partnership and accordingly promulgated Article 1570 above cited, which disregards the unit basis of accounting. Most certainly the unit cost basis is not to be used when the Regulations provide for another method. It was not used in *Burnet v. Logan,* 283 U. S. 404, 75 L. Ed. 1143, which involved a contract for removal of ore over a period of years. It is not used in determining profits on

long-term contracts. It is not used in determining gain or loss to a stockholder on liquidation of a corporation even when the liquidation is accomplished by a series of liquidating dividends spread over a period of years. (Article 1548 of Regulations 45, and corresponding Articles of all subsequent Regulations).

It is true also that the income tax is an annual tax, but it is not true that profit or taxable gain must be determined every year nor that profit cannot be deferred for taxation purposes. Taxable income is deferred where a corporation contingently credits its employees with bonus stock, available after five years of employment. (Article 53 of Regulations 45). Taxable profit is deferred in the case of installment sales and sales on deferred payments. It was deferred in *Burnet v. Logan, supra.* It is deferred in certain types of reorganizations. Section 330 of the Revenue Act of 1918 and corresponding sections of subsequent acts set forth a comprehensive and well-considered Congressional scheme for tax deferment in certain types of cases.

Other instances in which income is deferred may be found in the following cases: *Thomas Bemis, Sr.,* 2 B. T. A. 255; *Edward J. McDonnell,* 4 B. T. A. 49; *C. E. Gullett,* 31 B. T. A. 1067; *Old Colony Trust Co. v. Commissioner,* (C. C. A. 1) 59 F. (2d) 168; *Corn Exchange Bank v. United States,* (C. C. A. 2) 37 F. (2d) 34; *Commissioner v. Tyler,* (C. C. A. 3) 72 F. (2d) 950; *Helvering v. Tex-Penn Oil Company,* 300 U. S. 481; *North American Oil Consolidated v. Burnet,* 286 U. S. 417.

It is apparent that to apply such a rule of accounting in order to determine a profit on the liquidation of assets of a dissolved partnership would be not only inequitable both to taxpayers (in case of gains) and to the Government (in case of losses) but would most likely

result in distorting the true income or profit of taxpayers. The petitioner's argument as to the taxation of annual income clearly does not apply in this case.

The only correct way to determine whether the liquidation of assets of a dissolved partnership has resulted in profit is to wait until the conclusion of the liquidation —deducting all capital items and expenses, making proper valuation and other adjustments, and treating the balance as profit.

We contend that the cost of a capital investment must first be restored from the proceeds of sale before there is gain taxable as income, and that "in order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." *Burnet v. Logan, supra; Doyle v. Mitchell Bros. Co.,* 247 U. S. 179, 62 L. Ed. 1054. The conversion of the assets into cash does not result in taxable income until the proceeds exceed the cost base. *Allen v. Commissioner,* 49 F. (2d) 716, cert. denied 284 U. S. 655, 76 L. Ed. 555.

In *Glenn v. Weill,* 319 Pa. 380, 383, the Supreme Court of Pennsylvania, in discussing distribution after dissolution of a partnership, quoted with approval from *Adams v. Hubbard, infra,* as follows:

> "'* * * there must be a return of the firm capital to the partners contributing it, in order that there may be a distribution of the profits.'"

In *Wood v. Wood,* 312 Pa. 374, the Supreme Court of Pennsylvania held that death dissolved the partnership; that the partners' interests immediately became fixed as capital; that profits of the partnership received

during liquidation were distributable upon final liquidation between the partners in the proportion of their respective capital contributions and not on the basis on which income was divided prior to dissolution.

In *Adams v. Hubbard,* 221 Pa. 511, 517 (1908), where a partnership had been dissolved by the death of a partner and the question of distribution of assets arose, the Court quoted with approval from *22 Am. & Eng. Ency. of Law* (2d ed.), 86, 87, as follows:

> "* * * 'Where a partnership is dissolved and its affairs are wound up, there must be a return of the firm capital to the partners contributing it, in order that there may be a distribution of the profits. *Each partner's contribution is regarded as a firm debt to such partner, which must be repaid before there are any profits to be divided.* Where one partner has advanced capital in excess of another, the amount advanced is a preferred claim upon the property of the firm. The distribution of capital upon dissolution is in the same proportion in which such capital was furnished.'" (Italics ours).

In *Heiden v. Beuttler,* 11 F. Supp. 290, 291 (N. D. Iowa, 1935), the Court said:

> *"It is fundamental that on the death of a member of the partnership that the partnership is dissolved, but that the surviving partner may, as trustee for the partnership, proceed to wind up the affairs of the partnership and that the property of the partnership first belongs to, and must be used for the payment of debts of, the partnership, and that the rights of the partners therein as individuals are only as to any balance that may remain after the payment of such indebtedness.* As a corollary to this rule, a creditor must first look to the firm property for the payment of obligations due

from the partnership before such creditor may ask the partners individually to pay any such obligation." (Italics ours).

Accordingly, under the decisions, there was no profit accruing to the former partners in 1920 in which they had a right to possession, yet the petitioner is contending that the proceeds from the liquidation of partnership assets in that year should be treated as if earned by the individuals, although they were not entitled to enjoyment and had no right to treat them as their own. There was a legal restriction on the disposition of the proceeds from such assets. As regards the proceeds from the sale of whiskey certificates in 1920, it was highly speculative as to whether or not the individuals were entitled to share in these proceeds, nor could the amount to which they might be entitled be reliably or accurately estimated. On the contrary, it was reasonably probable that a large amount of money would have to be paid to discharge debts of the partnership and contingent liabilities. Even if a profit was realizable in 1920, they did not receive such profits as individuals under a claim of right to such, but received money as trustees. Such moneys were not unqualifiedly subject to their demands until all debts and contingent liabilities were discharged. There was no economic enjoyment by the surviving partners of the funds which came into their hands as liquidating trustees.

The partnership agreement contemplated liquidation on the death of a partner, and the total cessation of all business except that incidental to the winding up of the partnership affairs (R. 19). What, then, did the former partners own at the death of Mr. Frick? They had an undivided interest in distilleries and a stock of whiskey. There was no occasion for inventories because there was no current turnover of goods manufactured.

The former partners had long before ceased to manufacture. The stock of whiskey was to be sold as a lot or otherwise, without replacement. This was not a situation for a unit rule method to account for profit.

The amount or price received for the partners' interests could not be determined until final liquidation. Using the unit cost basis, the petitioner contends that the surviving partners realized a profit on the sale of whiskey certificates, on bottling operations, storage and sale of barrels. On the unit cost basis a profit could be computed mathematically but who could tell in 1920 whether on final liquidation the amount received would have equalled the cost base or that such mathematically computed profit correctly reflected net income? What if the Government had seized, confiscated and destroyed all whiskey in 1921 or 1922? What if the distilleries had been forced to bottle all whiskey and immediately pay the Internal Revenue tax of $2.20 per gallon? What if the price of liquor had dropped below cost? What if the restrictions on use and sale had been tightened so that it would have been impossible to sell the distilleries and whiskey in bulk and the carrying charges were such that the whiskey could only be kept at a loss, or sold at a loss, or destroyed to mitigate loss? What if the distilleries and whiskey had been sold at such a loss in 1925 that, even considering the alleged profit in 1920, the net result would have been a loss? In any of these events, any one or more of which might have occurred, could it then have been said that respondents realized gain in 1920 when in 1925 the net result of liquidation showed a return of capital less than cost?

Under the law of Pennsylvania, the surviving partners were without authority to distribute any part of such receipts and the proceeds from sales in liquidation

were held subject to payment of all partnership debts and liabilities. (*Infra,* pp. 44-48).

The two partnerships were in liquidation and were entitled to recover back their capital, that is, their tax base, before they realized any profit subject to tax. By Article 1570, the Regulations above cited have consistently recognized that the cost of a partner's interest in the partnership business becomes capital to the partner on dissolution. These Regulations are not in conflict with any statutory provision relating to the question. They are reasonably within the intent of the taxing statute and do no violence to the letter or spirit of the Act. The statute has been re-enacted without change. They therefore ought not to be disturbed, unless plainly wrong. *Universal Battery Co. v. United States,* 281 U. S. 580, 583, 74 L. Ed. 1051; *Northwest Utilities Securities Corp. v. Helvering,* 67 F. (2d) 619, 621; *Robertson v. Downing,* 127 U. S. 607; *Edwards' Lessee v. Darby,* 12 Wheat. 206; *Brewster v. Gage,* 280 U. S. 327, 74 L. Ed. 457, 462, and cases there cited.

By successive re-enactments of the Statute without change, these Regulations have become law. *Massachusetts Mutual Life Insurance Co. v. United States,* 288 U. S. 269; *Old Colony R. R. Co. v. Commissioner,* 284 U. S. 552; *Poe v. Seaborn,* 282 U. S. 101; *Wisconsin v. Illinois,* 278 U. S. 367, 413.

Article 1570 of the Regulations was considered by the Circuit Court of Appeals for the Second Circuit in *Helvering v. Walbridge,* 70 F. (2d) 683, certiorari denied 293 U. S. 594. In that case Walbridge had contributed to a partnership certain securities on which he already had a capital gain. These securities were sold by the partnership at an even higher price. The firm

paid the tax on the second appreciation and the Commissioner asserted a deficiency against Walbridge for a capital gain prior to the transfer. The Board of Tax Appeals held that Walbridge was taxable only upon liquidation of the partnership and depending on whether his share was greater or less than his original contribution. This was affirmed by the Circuit Court of Appeals, which held that the capital gain of an individual is not taxable until liquidation, saying in part, at page 684:

> "* * * Ever since the Act of 1918 the Regulations had provided that only upon dissolution of the firm did the partner individually 'realize' any gain or loss on firm transactions, and at that time his gain was the difference between his liquidating dividend and the original cost to him of his contribution. Article 1570, Regulations 45, Act of 1918; article 1570, Regulations 62, Act of 1921; article 1603, Regulations 65, Act of 1924; article 1603, Regulations 69, Act of 1926; article 604, Regulations 74, Act of 1928. Indeed if the liquidating dividend was in kind, no gain was 'realized' until the property distributed was sold, a provision of doubtful validity except perhaps in cases where the dividend did not itself have any 'fair market value.'"

In *Selma Wertheimer,* 31 B. T. A. 407, stockholders of A. Guckenheimer & Bros. in 1921 irrevocably transferred their stock to trustees under agreement empowering trustees to sell the stock and apply funds to the settlement and payment of corporate debts and thereafter to distribute the residue *pro rata.* The stock was sold in 1921 and all debts were paid on or before January 21, 1926, when the trustees distributed a part of the residue of the trust *corpus* retaining part to defray expenses incident to proceedings for refund of Federal taxes. The Board held that the trust was not terminated

in 1926 and the loss, if any, sustained by the former stockholders could not be definitely ascertained until complete liquidation. The rule applying to losses should equally apply to gains.

Upon the death of Mr. Frick, the interests of the deceased partner, as well as those of his survivers, were capitalized. *Wood v. Wood, supra; Maurice L. Goldman, et al., Executors,* 15 B. T. A. 1341-1346; *Archbald, Jr., et al., Executors,* 4 B. T. A. 483.

Petitioner says in his brief (p. 42):

> "The article (1570) intends that the gain or loss on the partner's investment is to be determined only when he has completely severed his connection, both with the partnership and its assets."

With this statement we agree completely. It is and always has been our position that no taxable gain resulted to respondents until all the assets were sold when for the first time it could be determined whether respondents realized gain or loss upon their partnership investment. Respondents had not completely severed their connection with the partnership assets or the firm in 1920.

Petitioner also says (Brief, p. 62) that the record does not show that respondents had not received from the partnership assets their tax bases prior to 1920. The record shows that the receipts by respondents for 1920 were less than the total cost bases of their capital investment as officially determined by the Commissioner. This fact was not questioned at the trial. The Court found that "The sum received from the sale of whiskey certificates by A. Overholt & Company and West Overton Distilling Company in 1920, and prior thereto during the existence of the partnerships was less in amount

than the cost of the assets of said companies to the partners, H. C. Frick, A. W. Mellon and R. B. Mellon." (Fdg. 23, R. 154, 169). The petitioner does not even say that this finding is not true in fact or call attention to anything in the record to contradict it.

It was not necessary for the Court to find specific figures, although it could have done so if necessary. The record amply supports the Court's findings. The income tax return for 1925 of The Union Trust Company, as liquidating agent (Ex. Z, R. 489) shows the net income for that year and distributions to the Messrs. Mellon and Frick Estate of $69,257.57 as ordinary income (refund of floor tax and other income less loss from bottling, storage, etc.) and of $882,303.64 as profit on liquidation. The return contains a schedule showing the computation of the gain on dissolution. It begins with the base of the partners as of January 1, 1919, the date of organization of the partnership, giving each respondent a base of $1,414,027.51. The schedule itemizes the so-called profits and losses for each year, 1919 to 1925 inclusive, as shown by the books, and the adjustments made by the Commissioner, with a resultant capital account for liquidation. It then shows the liquidation distributions to respondents and the Frick Estate, applies the base of each, and arrives at a capital net gain for each respondent of $882,303.64. The return of the liquidating agent for West Overton Distilling Co. was similar in all respects except as to amounts. (Ex. AA, R. 490). Respondents picked up on their individual returns the respective amounts shown on the return of the liquidating agent. Exs. X, Y, R. 485-86).

The Commissioner, after examination and audit, made no change except (1) to eliminate from ordinary income the reported profit of $69,257.57 for the reason that he included that sum in the computation of capital

net gain on liquidation, (2) to increase the distribution in liquidation to each respondent by his one-third share of $100,000 distributed to employees in 1925, and (3) to decrease the base from the January 1, 1919 cost of each respondent's interest in the partnership as adjusted ($1,303,071.08) to the value of that interest on December 2, 1919, the date of Mr. Frick's death ($909,775.53), a decrease of $312,315.55. The adjustments made by the Commissioner resulted in a total increase in income of each respondent of $345,648.88. (Exs. BB, CC, R. 491-503).

In protest briefs filed June 21, 1928, the respondents accepted the Commissioner's computation of the liquidating profit including his determined base of $990,775.53 for A. Overholt & Co. and $60,505.66 for West Overton Distilling Company. (Exs. DD, EE, R. 504 g, 506 f). These bases were carried forward by the Commissioner into his notices of deficiencies for 1925 and thus became his official determination. (Exs. BB, CC, R. 491-503). The alleged profit of each partner for 1920 from the sale of whiskey certificates was $233,429.21 for A. Overholt & Co. and $46,853.73 for West Overton Distilling Company (Fdgs. 17, 5, R. 153, 150). The Circuit Court of Appeals so found (R. 711). These figures were accepted by the taxpayers and the tax was paid on this basis. They have never been questioned by either party.

However it was only necessary that the Court find the "ultimate facts upon which the law must determine the rights of the parties." *United States v. Sioux City Stock Yards Co.*, 167 F. 126 (C. C. A. 8); *Anglo-American Land, M. & A. Co. v. Lombard*, 132 F. 721 (C. C. A. 8), cert. denied, 196 U. S. 638 (both opinions by Judge Van Devanter). The findings of the trial court should "not be a recital of evidence or of circumstances which

may tend to prove the ultimate facts or from which they may be inferred." *Raimond v. Terrebonne Parish,* 132 U. S. 192, 220.

The determination of the Commissioner is presumed to be correct (*infra,* p. 70), and no evidence was introduced to contradict it. Petitioner knows that the amount received in 1920 was less than the cost basis and he is only attempting to raise a technicality which is without merit. In any event, the question cannot now be raised.

This Court has frequently held that findings of fact concurred in by the two lower courts will be accepted by the Supreme Court unless clear error is shown. In *United States v. Commercial Credit Co.,* 286 U. S. 63, 76 L. Ed. 978 (1932), the Court said:

> "* * * The two courts below are in agreement as to the inferences fairly to be gathered from the facts, and their findings are not to be disturbed unless clearly erroneous."

See also *United States v. Chemical Foundation,* 272 U. S. 1, 71 L. Ed. 131 (1926); *Second Russian Insurance Co. v. Miller,* 268 U. S. 552, 69 L. Ed. 1088 (1925); *L. E. Waterman Co. v. Modern Pen Co.,* 235 U. S. 88, 59 L. Ed. 142 (1914).

The cases relied upon by petitioner are not in conflict with our position.

Rossmoore v. Anderson, 1 F. Supp. 35 (S. D. N. Y.), affirmed 67 F. (2d) 1009 (C. C. A. 2), cert. denied 292 U. S. 630, involves an entirely different situation. In that case, a partnership was dissolved by agreement on November 1, 1920. All of the capital except a reserve of $5,000 for expenses was distributed and apparently

all capital contributions were returned in full. In 1921 the sole assets of the firm consisted of moneys to be received for services rendered and to be rendered in the completion of contracts already made. The Court said that the money in question "presumably was earned after dissolution." As the capital distribution had been made prior to the receipt of the income in question, of course the money received for services could only be income. It was not derived from a sale of capital assets but from personal efforts of the partners. The question the Court decided was not whether the income was taxable, which seems to have been admitted, but whether it was taxable to the partner or his assignees. There was no question before the Court of possible losses chargeable against capital. In the present case there was no continuance of the partnership business in 1920 but merely the sale of assets in dissolution. Article 1570 of Regulations 45 was not mentioned in the Rossmoore opinion and probably was not called to the attention of the Court as it did not apply to that situation.

Roney v. Commissioner, (C. C. A. 4), 67 F. (2d) 165, is not in point. It is not the case of a partnership in liquidation as the result of dissolution caused by the death of a partner. Roney and his partner, Shapira, were engaged in buying and scrapping distillery properties. They bought a number of distilleries, including the Gynnbrook Distillery. It was purchased in 1919. In 1920, the plan changed and the partners secured a permit from the Government and *actively distilled whiskey for sale.* The Court held that the whiskey was thus held primarily for sale—under the statutory definition of capital assets contained in Section 101 of the Revenue Act of 1928. But that definition applies only to transactions occurring after December 31, 1921, and has nothing whatever to do with the question as to whether

such assets become capital assets when a partnership is dissolved by the death of a partner and the partnership assets are in process of liquidation. See Revenue Act of 1921, Section 206 (a) (1), and Acts of 1924 and 1926, Section 208 (a) (1).

If, in our case, the respondents had engaged actively in making whiskey, if they were a "going concern," if there were no question of dissolution of the partnership, if *all* the assets had been sold in 1920, and if the transactions occurred after December 31, 1921, then the *Roney* case would be comparable. The situation there before the Court is entirely different from ours and the principle of the case is in no way applicable.

Renziehausen v. Lucas, 280 U. S. 387, 74 L. Ed. 501, involved an *individual,* not a partnership, who contended that part of the whiskey in his warehouses was a personal investment and therefore a capital asset, but the Supreme Court said that the "whole business was his" and was part of his stock in trade. Here again, the statutory definition of capital assets, under the Revenue Act of 1921, excluding stock in trade, is applicable, and is not to be confused with a situation existing prior to that Act. This case is even farther removed in point of principle and fact than the *Roney* case, *supra.*

Earle v. Commissioner (C. C. A. 1), 38 F. (2d) 965, holds only that income earned prior to dissolution by death, is taxable, even though the partner's death occurred prior to the end of the tax year, and the gain realized thus became part of the capital assets. To be comparable to the *Earle* case, the items in question here would have to be income earned prior to the death of Mr. Frick and not in the year following his death. The admitted profits at issue in the *Earle* case arose from a sale

made on June 14, 1923. One partner died on July 1, 1923. Not only that, but the June sale was of all the assets, which were taken over by a corporation which assumed all the debts. The facts in the case (practically conclusive on appeal), are set forth in the findings of the Board (15 B. T. A. 668, 669, 670). In the opinion of the Board (Phillips, Member), we find this comment (p. 671):

> "It appears that the net income of the partnership * * * was some $70,000, all of which had been earned prior to the death of Eugene V. Earle. *The partnership was not only terminated in 1923 by the death of this partner, but its affairs were liquidated in that year by transferring all its assets to a corporation,* which assumed all of the obligations and liabilities of the partnership. This transfer, however, was not of the nature which could give rise to a taxable gain or deductible loss. Section 202, Revenue Act of 1921. The taxable year of the partnership being the same as that of the partners, the liquidation having been accomplished within the year without gain or loss, and all of the profits of the year having been accrued and received by the partnership prior to its termination by the death of a partner, *there are not here involved those questions which arise where the partnerships and the individual partners have different accounting periods, where losses are sustained during the period of liquidation, or where liquidation is not completed within the taxable year.*" (Italics ours).

The above statement distinguishes the case. All else is outside the present discussion. The *Earle* case is therefore without force here.

Burnet v. Sanford & Brooks Co., 282 U. S. 359, merely decided that the method of reporting income by

yearly periods, adopted by the company for 1913 to 1916, inclusive, properly reflected income on an annual basis. The income arose from a dredging contract. The years 1913, 1915 and 1916 showed net losses. These were recouped by a judgment in 1920 against the United States on the dredging contract (for misrepresentation of borings made part of the specifications). (Cf. *United States v. Atlantic Dredging Co.*, 253 U. S. 1). There was no question of dissolution or of profit on liquidation. Indeed, the case is authority for respondents, as it contains this significant statement by Mr. Justice Stone, at page 363 of the opinion:

> "That the recovery made by respondent in 1920 was gross income for that year within the meaning of these sections cannot, we think, be doubted. The money received was derived from a contract entered into in the course of respondent's business operations for profit. While it equalled, and in a loose sense was a return of, expenditures made in performing the contract, still, as the Board of Tax Appeals found, the expenditures were made in defraying the expenses incurred in the prosecution of the work under the contract, for the purpose of earning profits. They were not *capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income.* See Doyle v. Mitchell Bros. Co., 247 U. S. 185, 62 L. Ed. 1059, 38 S. Ct. 467, supra." (Italics ours).

Guckenheimer & Bros. Co. v. Heiner (W. D. Pa. not reported) has been rightly distinguished by the learned trial judge in his opinion in the instant case (R. 159). There are distinguishing points other than those given in his opinion. In that case there was some miscellaneous operating income, comparable to the "bottling and

sale of barrels" income in this case, which was returned originally by each of these plaintiffs, on which a tax was paid, and which is outside this case. There was no segregation of that sort of operating income from the moneys derived from capital operations. Consequently, the Court found itself "unable from it (the claim), or from the testimony, to give plaintiff relief from its indefinite claim." The Trial Judge was generally inclined in favor of the plaintiff's argument, however, for he said: "The second claim of the plaintiff has undoubtedly much inherent force." In our cases, the force is positive. A tax has been paid on the miscellaneous or current income (so-called) and it is out of this suit. The tax that the court found should be refunded is on the "capital" part which the Guckenheimers failed to segregate but which was clearly separated in the present cases.

The petitioner cites Section 218 (a) of the Revenue Act of 1918 (Appendix, page 96), which applies by its own terms only to "individuals *carrying on business* in partnership." As before stated respondents were not carrying on business in partnership but were liquidating a partnership dissolved by the death of Mr. Frick, as was necessary under the Uniform Partnership Act of Pennsylvania. Article 1570 prescribes the manner and method of computing tax on liquidation of a partnership, while Section 218 prescribes the manner and method of computing tax on the current income of a partnership actively conducting business. Section 218 (a) of the Revenue Act of 1918 levies a tax on the distributive share of each partner whether distributed or not. Here there was no distributive share and therefore no taxable income, and Article 1570 provides that no tax shall be levied in such a case until final distribution. The individual partners were not entitled to cur-

rent earnings of the partnerships in liquidation until liquidation had been completed.

The argument that taxation of a dissolved partnership in the manner determined by the District Court "may distort the Government's tax receipts from year to year" (Petitioner's Brief, p. 49), is certainly fallacious when we consider how few partnerships are dissolved by death of a partner and liquidated. The small amount involved in comparison with the billions of dollars of annual Government income makes the income tax on such dissolutions of no importance from the standpoint of Government receipts.

Neither the Revenue Acts nor *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, decide that any taxpayer must pay a tax every year to "assure a regular flow of income to the Government." As pointed out in this brief (pp. 18-19), there are many instances in which taxable profit is deferred in items similar to this and even if deferred will not distort the Government's tax receipts from year to year. If such should be the case, the remedy is by statute or a new regulation which the Treasury Department has not yet considered necessary.

Petitioner's statement (Brief, p. 49) that the decision of the District Court will constitute a dangerous precedent by affording a "loophole for tax evasion" is unwarranted. There are no facts in the record nor in the findings of the Court to support such a statement. On the contrary the evidence shows conclusively the lack of any intention to avoid payment of a tax, let alone to evade tax. The remedy, if any is needed, is a change in the rule established by the regulation and is legislative and not judicial. This argument, introduced in this Court for the first time, is untenable and without merit. The fact is that respondents made full disclosures of the

transaction and paid a tax on the same income in two separate years when assessments were made by the Commissioner. Surely an attempt to recover one of the taxes so paid cannot be called "tax evasion." This case turns on its own particular facts and the decision does not present an opportunity either for the avoidance or evasion of taxes by others in the future. *There is no principle involved in this case other than the application of a regulation promulgated by the Commissioner himself.*

Petitioner says that the settlement with the Frick Estate, in which it was determined that as to it the income in question was taxable in 1925, is inconclusive since it may show merely that the Commissioner erred in determining the tax due from the Frick Estate. Certainly all partners are taxable on the same basis, and the petitioner, who so frequently calls in his brief for equitable treatment, cannot contend that it is equitable for the Government to settle with the Frick Estate on one theory and later claim from the other partners a tax on another and different basis when it has, in the meantime, collected a tax from the other partners on the same basis as that paid by the Frick Estate. The cases cited by petitioner in this connection relate to income taxes on profits from a continuing business. They deal with the question of what income is chargeable to the individual and what portion to the estate, and not with the question of a profit on the sale of capital assets as in this case. We know of no authority which holds that on a sale or liquidation of capital assets of a dissolved partnership, a deceased partner's share is taxable on a different basis than that of any other partner.

The petitioner, in his brief (p. 26), argues that a partnership must file tax returns until its affairs are

terminated. There is no requirement to this effect. It may, under the law, be necessary to file information returns during liquidation but the filing of these returns does not require the payment of tax by the dissolved partnership or necessarily by the surviving partners as individuals. Petitioner also argues that the same rule as to the payment of income tax during liquidation should apply to a partnership in liquidation as to an individual who is selling out his own business. This is an entirely different situation and was recognized by the Treasury Department when it adopted Article 1570. An individual is entitled to the proceeds of the sale whereas the surviving partner, as trustee for the decedent, is only entitled to his distributive share, if any, upon complete liquidation. On dissolution there are no current earnings of the partners from the sale of capital assets until the investment of the individual partners is returned.

While a partnership may not be recognized as a taxable entity, yet it is a legal entity and has a status entirely separate from that of the individual partners. A corporation has another status. It is a separate taxable entity while a partnership is not, and the Treasury Department has recognized this by adopting regulations putting a partnership on a different basis, both when it is carrying on business and when it is dissolved.

The law imposes various duties on liquidating partners as to the collection and sale of assets, the payment of debts and final distribution. The liquidating partners could not carry on the business in the manner in which it was carried on by the partners prior to Mr. Frick's death. Before he died, it was an ordinary partnership and its business could be conducted in any way that the partners agreed. After his

death the surviving partners were liquidating trustees and their actions with respect to the partnership property had to be conducted in accordance with the direction of the statutes and decisions of the Courts.

The return filed for 1920 classed as income taxable to the partners, money received from bottling, storage, etc., the current operations of the partnership, but did not include the funds realized from the sale of capital assets. In other words, so far as the current business of the partnership was concerned, the liquidating partners were willing to and did pay tax on the profits as income to them and the tax assessed and paid on such profits is not involved in these actions. There is doubt, however, as to whether even the income from bottling, storage, etc., was taxable income for the year 1920. Even the Commissioner expressly ruled otherwise, holding that all profits during liquidation were taxable in 1925 when the remainder of the property was sold (Ex. 6, R. 605; R. 328, 341-42; Exs. BB, CC, R. 491, 497).

We do not contend that on dissolution a partner's interest in the firm is converted into a specific interest in the assets of the partnership, but there can be no doubt that his interest in the whole partnership is capitalized and until the liquidation returns to him the cost of his interest, he has received no taxable income from it. The debts must be paid before he receives anything, and how can he be taxed on an alleged profit which may never come to him because it must be used to pay partnership obligations? For this reason, the proceeds of sales of certificates during liquidation are not current nor operating earnings as stated in the petitioner's brief (p. 45), and no taxable income is realized until such earnings are paid to the partners and represent profits to each partner on his partnership investment.

The Government's brief proceeds on the premises that the sale of the warehouse certificates resulted in current "operating profit." It has been shown that there can be no operating profit from the sale of a capital asset of a partnership in liquidation, taxable to the surviving partners until the selling price of all such assets exceeds the cost basis of the partners' interest. The petitioners use of the words "operating profit" is misleading. "Operating" necessarily means the carrying on of a process of buying and selling, manufacturing and selling, barter and trade—a continuous process. It cannot logically, or on the basis of sound reasoning, be said to include the sale of such capital assets, there being no continuing process and no opportunity for replacement for the purpose of continuing trade or manufacture or sale. There can be no operating profit in the liquidation of non-replaceable capital assets. The surviving partners were not carrying out a scheme for profit making, the essential feature of a business.

In *Wood v. Wood, supra,* the Supreme Court of Pennsylvania held that a partnership is dissolved by death of a partner; that interest on bonds and dividends on stock owned by the partnership at the time of dissolution were not profits "produced by partnership trade, for that had ceased;" that from and after date of death of a partner "partnership trade was ended; such business as was done, * * * was merely for the purpose of winding up the firm affairs."

We submit that no taxable income from any source was realized from the liquidation of A. Overholt & Co. or West Overton Distilling Company during the year 1920; that the whiskey certificates sold during 1920 in connection with the liquidation of the former partnerships were capital assets and until the proceeds ex-

ceeded the cost of the interests to the partners, which did not occur until final liquidation in 1925, there was no taxable gain.

II.

The Surviving Partners of A. Overholt & Co. and West Overton Distilling Company Were Trustees for the Liquidation of the Partnerships.

Mr. Henry C. Frick, one of the partners, died on December 2, 1919. During the year 1920 A. W. Mellon and R. B. Mellon, as surviving partners, were liquidating the former partnerships. Their legal status is fixed by the laws of the State of Pennsylvania.

The death of Mr. Frick dissolved the partnerships. *Uniform Partnership Act* (Act of March 26, 1915, P. L. 18, Purdon's Pa. Stat. Ann. Title 59):

> "Section 29. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business.
>
> "Section 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.
>
> "Section 31. Dissolution is caused:
>
> * * * * * *
>
> "(4) By the death of any partner;
>
> * * * * * *
>
> "Section 33. Except so far as may be necessary to wind up partnership affairs, or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership, * * *."

Froess v. Froess, 284 Pa. 369, 373; *Clarence B. Davison,* 20 B. T. A. 856; *John L. Hall,* 25 B. T. A. 1; *R. W. Archbald, Jr.,* 4 B. T. A. 483; *Maurice L. Goldman,* 15 B. T. A. 1341.

It will be noted that Section 29 definitely distinguishes between a dissolution by death or withdrawal of a partner and a voluntary winding up of the business. Petitioner's argument seems to lose sight of this distinction.

The partnership agreements contemplated dissolution by death of a partner, providing: "In case of the dissolution of the firm by death of one or more of the partners, * * *" (Exs. A, B—Statements of Claim, R. 15-19, 321).

The articles of agreement of January 31, 1921, recited in part:

> "WHEREAS, on the 2nd day of December, A. D. 1919, said copartnership was dissolved by the death of said Henry C. Frick; and
>
> "WHEREAS, said copartnership has been in the process of liquidation since the date of the death of said Henry C. Frick; * * *" (Exs. C, D, Statement of Claim; R. 19-23, 323).

Notwithstanding that the partnerships had not terminated (Sec. 30 of said Partnership Act, *supra*), the surviving partners thereupon became liquidating trustees of the two former partnerships, with the duty of accounting as trustees upon the completion of the liquidation. *Froess v. Froess,* 284 Pa. 369, 289 Pa. 69; *Eisenlohr's Estate (No. 1),* 258 Pa. 431; *Brown's Appeal,* 89 Pa. 139.

In *Froess v. Froess,* 284 Pa. 369, 373, the Supreme Court of Pennsylvania said:

> "Admittedly, the partnership was dissolved by the death of the copartner. That this result followed appears by the Uniform Partnership Act (March 26, 1915, P. L. 18, section 31), and it was equally true before that legislation became effective; Shipe's App., 114 Pa. 205; Mamaux's Est., 274 Pa. 533; Underdown v. Underdown, 279 Pa. 482. After the death, it became the duty of the survivor to settle the partnership affairs, and all authority on his part ceased, except such as was necessary for the winding up of the business, or completing transactions then begun, but not yet finished (Partnership Act, section 33). * * * *It is the duty of the liquidating partner to account as trustee for assets which come into his hands* (20 R. C. L. 1003; Leary v. Kelley, 277 Pa. 217; Hay's App., *supra*), and, on cause shown, as here, the court may direct that this be done: Partnership Act, section 37; Underdown v. Underdown, 270 Pa. 229." (Italics ours).

As such liquidating trustees, the surviving partners were not required to liquidate and wind up the affairs of the former partnerships at once but were entitled to have a reasonable time within which to do so. What is a reasonable time is largely within the discretion of the court and all the circumstances are to be given consideration. In view of the uncertainty of the whiskey business, the restrictions on its use for medicine only, the restrictions on sale, the increasing hazards of the business, such as robbery, complete destruction by contemplated confiscatory laws or regulations, taxes, etc., the liquidation of these two partnerships was seasonably done, exceptionally well handled and managed, and a period of six years' time was, under all the circum-

stances, not unreasonable. This is not disputed by petitioner. See *Hall v. City Park Brewing Company,* 294 Pa. 127.

The continuance of the partnership "until the winding up of partnership affairs was completed" did not mean that it was in existence for all purposes as though it had not been dissolved. It continued merely for the purpose of liquidation and subject to all laws relating to liquidation including Article 1570 of Regulations 45 heretofore cited. A partnership in dissolution is in no way similar to a corporation in dissolution. Under Article 1570 another and different rule is applied to the tax status of a partnership.

Petitioner's brief (p. 57) says that the partnership agreement provided "that the surviving partners *should* appoint a liquidating trustee," and from this he argues that because they did appoint such a trustee in 1921 after the tax year in question, the surviving partners never became liquidating trustees. The partnership agreement did not provide that the surviving partners should appoint a trustee but merely gave them discretionary power to do so, and the fact that they delayed for a year in taking this step certainly under the law of Pennsylvania, left them acting as such trustees during 1920.

Petitioner's brief (p. 57) says in substance that even if the respondents were surviving trustees, it does not follow that they were required to be treated as trustees by the taxing authorities as the Federal statutes have their own criteria in such matters irrespective of local laws. There can be no doubt that the law of Pennsylvania governs in this case as to the dissolution of the partnership, the status of the surviving partners as

liquidating trustees, their duty to pay all debts before distribution and similar matters. These questions are to be determined by local law. When they have been so decided, then on that basis the question of Federal taxability is to be determined. *Freuler v. Helvering,* 291 U. S. 35, 78 L. Ed. 634 (1934); *Blair v. Commissioner,* 300 U. S. 5 (1937); *Group No. 1 Oil Corp. v. Bass,* 283 U. S. 279, 75 L. Ed. 1032; *Burnet v. Coronado Oil & Gas Co.,* 285 U. S. 393, 76 L. Ed. 815; *Poe v. Seaborn,* 282 U. S. 101, 75 L. Ed. 239; *Judson v. United States,* 15 F. Supp. 62 (Ct. Cls.); *Leser v. Burnet,* 46 F. (2d) 756 (C. C. A. 4); *Cameron v. Commissioner,* 56 F. (2d) 1021 (C. C. A. 3); *Old Colony Trust Co. v. Commissioner,* 73 F. (2d) 970 (C. C. A. 1).

The lower court properly held that the surviving partners acted in respect to the assets of the former partnerships as liquidating trustees with a duty to account to the Frick Estate. (R. 159).

III.

Under the Laws of Pennsylvania, the Surviving Partners as Liquidating Trustees Were Unable to Make Any Distribution in Liquidation Until All Present and Contingent Liabilities Had Been Paid, Satisfied or Adequately Provided For.

Under the law of Pennsylvania no distributions could have been made by the liquidating partners until all debts and liabilities, contingent or otherwise, had been paid or satisfied or other provision made therefor, and under such circumstances neither the surviving partners nor the estate of the deceased partner could legally be taxed on any income from the sale of partnership assets until final distribution, whether such assets be considered capital assets or not. The *Uniform Part-*

nership Act provides (Act of March 26, 1915, P. L. 18, Sec. 40, 41 (8), Purdon's Pa. Stat. Ann. Title 59):

"Section 40. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

* * * * * *

"(b) The liabilities of the partnership shall rank, in order of payment, as follows:

"I. Those owing to creditors other than partners,

"II. Those owing to partners other than for capital and profits,

"III. Those owing to partners in respect of capital,

"IV. Those owing to partners in respect of profits.

* * * * * *

"Section 41.

* * * * * *

"(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section, *the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business,* on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property." (Italics ours).

In *47 Corpus Juris* 1169, it is said:

"Firm obligations must be paid out of the firm assets before any partner's share can be ascertained,

and therefore before any partner is entitled to any part of the assets, and this rule applies in determining the interest of a retiring partner."

In the case of *Herron v. Wampler,* 194 Pa. 277, cited in *Froess v. Froess,* 284 Pa. 369, the Supreme Court stated that distribution of the net surplus of partnership assets *is the final step in the winding up of a partnership business.*

In the case of *Powell v. Bennett,* 30 N. E. 518 (Ind. 1892), the Court said:

"We are of the opinion, however, that the court erred in overruling the motion of the appellant for a new trial. It is conceded by the briefs before us that the partnership debts are not paid. It was as necessary to prove on the trial that the partnership debts were paid as it was to allege it in the complaint. Page v. Thompson, 33 Ind. 137; Briggs v. Daugherty, 48 Ind. 247; Lang v. Oppenheim, 96 Ind. 48. In the case of Page v. Thompson, *supra,* which was an action by one partner after the partnership business had ceased, to recover his part of a debt due the firm, this court said: *'The plaintiff had no right, either at law or in equity, to put any part of it in his private pocket until the creditors of the firm were satisfied. It cannot be useful to cite authorities on so plain a proposition.'* * * * *What we do decide is that, until the creditors are paid, no member of the firm can recover, for his own use, any part of the partnership assets.'* (Italics ours).

The *Powell* case has been cited and approved in *Shrum v. Simpson,* 57 N. E. 708 (Ind. 1900), *Bond v. May,* 78 N. E. 260 (Ind. 1906), and *Adams v. Carmony,* 87 N. E. 708 (Ind. 1909).

In *Lawson v. Dunn,* 57 Atl. 415 (N. J. Equity 1904), the Court said (p. 416):

> "It is quite clear that the claims of the partners cannot be recognized until the *other claimants* are paid in full." (Italics ours).

The Board of Tax Appeals in the case of *R. W. Archbald, Jr.,* 4 B. T. A. 483, said, in discussing the liquidation of a partnership (p. 485):

> "* * * *Its debts must be paid, its accounts must be collected, its contracts must be performed, its assets must be sold or distributed in kind and all of its business affairs must be terminated and disposed of."* (Italics ours).

In *Oyster v. Short,* 177 Pa. 594, the Court held that it was not disputed that under the general rule applicable to liquidation that partners or members of a firm could not participate in the distribution until the creditors had been provided for.

There was uncontradicted and unimpeached testimony that there were large accounts payable on January 1, 1920 (Ex. 2; R. 350) and large contingent liabilities of the partnerships existing in 1920, sufficient to stop absolutely any thought of distribution at that time. These contingencies were (a) the possibility of a floor tax being levied on the whiskey by the Government, (b) the possibility of being required by the Government to remove the whiskey to a concentration warehouse and payment of tax, and (c) the possibility of being required by the Government to bottle all whiskey and pay the tax immediately. If any of these contingencies had materialized, the surviving partners would have been required to spend large sums of money. (R. 369-73).

In addition to the contingencies mentioned, the Government was proposing to assess additional income

taxes for the years 1916, 1917 and 1918 against the two corporations, A. Overholt & Co. and West Overton Distilling Company, for which taxes the partnerships were liable, in an approximate aggregate amount of $550,000, which taxes were not finally settled until 1928. In 1920 this fact was well known to the Government. (R. 374-79).

In view of the circumstances of this particular case, it cannot be disputed that any distribution by the liquidating trustees to the surviving partners or the representatives of the deceased partner prior to the final settlement of the affairs of the dissolved partnership, would have been unauthorized and in plain violation of the duties of the liquidating trustees.

IV.

If the Former Partnerships Realized Any Taxable Income in 1920, It Was Income to the Liquidating Trustees and Taxable to Them as Separate Entities.

A. THE SURVIVING PARTNERS WERE LIQUIDATING TRUSTEES, TAXABLE AS SEPARATE ENTITIES.

Whether we consider the surviving partners taxable individually or as liquidating trustees, we contend, for the reasons heretofore stated, that no taxable income was realized in 1920 from the liquidation of said partnerships.

But if this Court should consider that taxable income was realized in 1920 from the sale of whiskey certificates, in that event the judgment should be affirmed on the ground that the liquidating trustees were separate taxable entities, that the tax, if any, was due and payable by such separate taxable entities and not by

respondents as individuals, or beneficiaries of the trusts, and the assessment and collection thereof against the trustees is now barred by lapse of time. The District Court held this alternative point is moot. Affirmance by this Court of the District Court's position will take this point out of the case entirely.

In the Revenue Act of 1918, Congress adopted a comprehensive scheme of taxation and provided in different sections for the assessment of taxes against individuals, against corporations, against fiduciaries (with exceptions), and also provided for the filing of returns of income for partnerships, personal service corporations and fiduciaries, although the tax on the income shown therein might be assessed against some other taxable entity. Such latter returns are commonly known as information returns. There is little difference between Form 1041, which is an information return by a trustee, and Form 1065, which is a partnership information return. Each shows the income and the amount distributable. In the case of partnerships the tax on the income is paid by the individuals, not by the partnerships. If a fiduciary return had been filed in this case, it also would have been only an information return, but a "return" nevertheless, and the Commissioner would have assessed the same tax, as his decision was based on a legal position and not on the form of the return.

Every fact in this case was known to the taxing authorities in 1921 when the 1920 return was filed. There were attached to the return of each partnership, full information schedules. The Bureau, very early in the history of this case, was advised of every *fact* in numerous Revenue Agent's reports (Exs. K, L.), examinations, audits and conferences, and at a time when the Com-

missioner had timely control of every right now alleged in his defense. This will be discussed more fully later in the brief.

The purpose of a return of income is well stated in *Hartford-Connecticut Trust Co. v. Eaton* (C. C. A. 2), 34 F. (2d) 128, which held that no penalty for failure to file a return is to be imposed where any return or list is filed, from which the requisite information may be derived. Circuit Judge Augustus N. Hand there said (p. 130):

> "the provisions for imposing penalties do not seem to require a taxpayer to choose the right blank at his peril, when he acts in good faith and makes a full disclosure of his income."

In the present case the return filed left blank the answers to the questions "Kind of business" and "State whether partnership or corporation" and stated the facts with respect to the death of Mr. Frick and that

> "* * * Messrs. A. W. and R. B. Mellon were, as surviving partners, required to carry on the liquidation of the assets of the copartnership." (R. 351 d).

The returns showed every fact necessary to raise the "trust" question and put the Commissioner on notice. So did the reports of the Revenue Agents made in 1921 (Exs. K, L; R. 448, 450). Responsibility for the legal solution of the question by the Commissioner, if erroneous, rests solely on the Commissioner's shoulders. (See cases cited on p. 61 hereof).

The fact that the respondents did not raise the legal question in their early briefs and protests is of no importance. Non-action does not amount to acquiescence and failure to protest does not affirm an error in law.

Petitioner could not have been and was not misled by the returns and therefore did not rely to his prejudice on any factual representations made by respondents.

As said in the *Tide Water Oil Company* case, 29 B. T. A. 1208, 1224:

> "* * * The Commissioner frequently corrects his interpretation of the taxing statutes. The petitioner could likewise abandon its interpretation of the law and adopt the correct one."

In *Bowers v. New York Trust Co.* (C. C. A. 2), 9 F. (2d) 548, 551, the Court said:

> "* * * Nobody estops himself into paying taxes by failing in the past to assert his full rights."

The whole intent of Sections 219, 225 and 200 of the Revenue Act of 1918 (Appendix, pp. 73-75) is that the tax shall be paid by the fiduciary of any trust except where the income has been distributed periodically to the beneficiaries, in which case the beneficiaries shall pay the tax. It contemplates that the fiduciary shall have all deductions to which an individual would be entitled.

Article 342 of Regulations 45 provides that in the case of a trust the income is taxed to the fiduciary as to any single individual except that from the income of a decedent's estate or a trust there may first be deducted any amount of income properly paid or credited to a beneficiary. In the instant case no income of the liquidating trustees was distributed or distributable in 1920.

Under the laws of the State of Pennsylvania the liquidating trustees of a partnership are fiduciaries of a trust within the meaning of those terms as used in the Revenue Act of 1918. The Revenue Acts make no dis-

tinction between express trusts and trusts created by operation of law. The Revenue Act of 1918 provides:

> "Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including— * * *."

The word "including" is a word of enlargement, not of restriction. *Pinellas Ice Co. v. Commissioner,* 287 U. S. 462, 470. If Congress had intended the section to apply to express trusts only, it would have said so. Section 225 applies to *every fiduciary* except receivers. Section 200 defines "fiduciary" to be:

> "The term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate; * * *."

Those provisions are certainly broad enough to cover the fiduciary of a trust created by operation of law.

The legal situation of the surviving partners with respect to the partnership assets was exactly as if they had transferred partnership assets to trustees under an agreement empowering the trustees to sell the assets and to apply the funds to the settlement and payment of partnership debts, federal tax liabilities, etc., and distribute the residue pro rata.

That a fiduciary is a separate taxable entity is now well settled. *Bankers' Trust Co. v. Bowers,* 295 Fed. 89, 23 F. (2d) 941; *Woolley et al. v. Malley,* 30 F. (2d) 73, rev'g 18 F. (2d) 668, cert. denied 279 U. S. 860; *Merchants' Loan & Trust Co. v. Smietanka,* 255 U. S. 509, 65 L. Ed. 751; *Jobes v. Crooks,* 33 F. (2d) 1016; *Busch v. Commisisoner,* 50 F. (2d) 800.

In a trust in which the income is added to the corpus and held for later distribution, the trustee must return the income, which is taxable to the trust and not to the beneficiary. If, therefore, the income from the sale of certificates in 1920 was taxable for that year, it was taxable to the trusts of which the liquidating partners were fiduciaries and not to the individual partners, and it is now too late to assert the tax against the fiduciaries.

In the preliminary argument (Brief, pp. 68-74, and Appendix B, pp. 105-112) to the argument on equitable defense, the Government now argues (1) that the collection of a tax from the liquidating trustees as separate taxable entities is not barred by any statute of limitations (p. 73); (2) that if such collection is barred, then respondents are not entitled in equity and good conscience to recover in these cases.

The question of the running of the Statute of Limitations is raised for the first time in this Court. It was not pleaded or argued by petitioner in the District Court and was not mentioned in the specifications of error argued in the Circuit Court of Appeals. It was not raised in the petition for the writ nor in the specifications to be urged and will not be considered in this Court. *Helvering v. Taylor,* 293 U. S. 507. Moreover, the petitioner expressly pleaded that "if said organizations were taxable trusts, as now contended by plaintiffs, the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting the aforesaid tax liabilities * * *" (R. 87, 116), and such pleadings were received in evidence, having been admitted in the respondents' replies (R. 388-90, 397-98). Since the United States is bound by the admissions of its counsel, *Tucker v. Alexander,* 275 U. S. 228. it is certainly

bound by its sworn pleadings. All parties assumed (and, we believe correctly) that the Statute had run and that no tax could now be assessed against the partners as liquidating trustees, if such action were now proposed. It is clear that if the Statute has run the delay in final action was not due to respondents but wholly to the Commissioner's office, which held the 1920 return from 1921 to 1927 before acting on it and held the 1925 return until 1928 before acting, and finally took until 1932, after suit was brought, to return to its original position and attempt to retain the tax for the year 1920.

B. RESPONDENTS ARE NOT ESTOPPED TO CONTEND THAT THE TAX FOR 1920, IF ANY, WAS PAYABLE BY THE LIQUIDATING TRUSTEES AND NOT BY THE INDIVIDUAL PARTNERS.

In the District Court petitioner filed amended affidavits of defense (R. 64-90, 93-120) raising as new matter the additional defenses of estoppel and recoupment. The District Court held that the facts did not sustain the defense of estoppel and that the defense of recoupment was met by the finding that the 1920 partnership gain was not distributed or distributive and that the equitable defenses raised only moot questions (R. 161). The Circuit Court affirmed, holding there were no grounds for applying the doctrine either of legal or equitable estoppel (R. 711). While not using the words "estoppel" and "recoupment" in this Court, petitioner raises the same questions as he did in the lower courts under the statement that "in equity and good conscience respondents are not entitled to recover."

This equitable defense must be considered only in the event that the Court should determine that the alleged 1920 income from the sale of whiskey certificates,

if any, was taxable to the respondents as liquidating trustees and as separate entities.

Respondents were assessed and paid a tax on alleged profits for 1920, and again were assessed and paid a tax on the same alleged profits for the year 1925. The District Court and the Circuit Court of Appeals have held that the alleged profits of 1920 were profits taxable in 1925. The Government has exacted and twice has received the tax on the same income. When it refuses to refund the tax paid for 1925, how is it possible for petitioner to contend that the respondents are not equitably entitled to recover the tax paid on the same income for 1920? The tax having been paid on the income realized in 1925, no tax is due for 1920 on account of such income, and there is nothing to recoup, this being true whether or not the liquidating trustees are taxable as separate entities. The petitioner has been fully satisfied.

This equitable defense seems to rely largely on *Stone v. White,* 301 U. S. 532, which is cited fifteen times in the latter portion of petitioner's brief. Therefore, at the outset of the answer to this defense we will call attention to the differences between *Stone v. White* and the present case.

The decision in *Stone v. White* was based solely upon equitable principles, the Court saying that there was only one tax due and the question was merely whether the tax should be paid by the trustee or by the beneficiary. An effort was being made to avoid payment of any tax on the income, either by the trustee or by the beneficiary. In the present case, a tax on the same income has been paid twice by respondents, due to two different assessments made by the Commissioner on the same income at different times and for different years.

In the present case, there is no identity of interest between the trustee and the *cestui que* trust as there was in *Stone v. White,* for the respondents as surviving partners were not entitled to all the income of the trust. Cf. *Sewell v. United States,* 19 Fed. Supp. 657 (Ct. Cl.); *Schlemmer v. United States* (C. C. A. 2), reported at 384 C. C. H. ¶ 9041. The respondents are not the "apparent" as well as the "real" taxpayers. The Frick Estate was the owner of a one-third interest in the partnerships, and hence the beneficiary to the extent of one-third of the assets, income and proceeds of sale. Moreover, the Frick Estate is now out of the picture, a settlement having been made with it by the Commissioner in 1927, and the entire estate was thereafter distributed. Therefore, any tax now assessed on the trust would have to be paid by the two remaining partners, without contribution from the estate.

The quotation in petitioner's brief (p. 75) from the opinion in *Stone v. White* does not apply to the present case for the following reasons:

(1) The retention of the tax would result in an unjust enrichment to the Government.

(2) Respondents did not avoid their just share of the tax burden as they have paid a tax on the same income in 1925.

(3) An injustice will be done to respondents if they are not permitted to recover the tax paid in 1920 and consequently to settle the tax claim on the same basis as the Frick Estate, namely—that the income was taxable in 1925.

(4) The reference to the error of the taxing authorities being excusable in view of judicial declarations, does not apply to the present case as the Commissioner does not claim to have relied on any decision of any court.

(5) The Government in these cases has taken with both its right and left hands and refuses to tender return by either.

With full knowledge of all facts, the Government changed its position twice and assessed a tax on the same income in two different years, placing a double tax burden on the respondents. In this instance the taxing authorities are to blame and not the respondents as the double payment was due to the double assessment; the taxing authorities are the sole cause of the situation; and if respondents are not entitled to recover, there will be an unjust enrichment to the Government, which has *at all times declined and still declines to refund or tender refund of the tax, paid on the same income, either for 1920 or 1925* although in justice and equity a refund should be made for one of the years. *Bull v. United States,* 295 U. S. 247.

The running of the Statute of Limitations in this case was not due to any fault of the respondents but solely to the delay of the taxing authorities in making up their minds as to the year in which the income was taxable, the record showing that the claim for refund of the 1920 tax, for which these suits were brought, was not filed until after the Commissioner assessed a tax for 1925 on the same identical income and was not rejected until two years after the present suits were instituted. The equities in this case are all on the side of the respondents and the principles stated in *Stone v. White* are not in conflict with their position.

This Court in *McEachern v. Rose,* decided on November 8, 1937, distinguished that case from *Stone v. White,* saying with respect to *Stone v. White*:

> "* * * The Commissioner neither sought, nor did Section 322, regardless of any period of limita-

> tion, permit him to credit the amount which the one taxpayer had paid against the tax which another should have paid. *Equitable considerations not within the reach of the statutes denied a recovery. It was enough, in the peculiar facts of the case, that the trustees had suffered no burden and that the Government was not unjustly enriched.*" (Italics ours).

Stone v. White is again distinguished in *Lyman v. United States,* decided by the District Court for the District of Massachusetts on January 28, 1938 (reported in 384 CCH ¶ 9079). There the court reviewed the facts in *Stone v. White* and the legal history of the taxation of income of similar trusts, and said: "I consider that decision to be limited to the peculiar facts of the case." The court further said:

> "* * * If, either the beneficiary of the trust, or the Government is to suffer a loss, in good conscience and equity, that loss should be borne by the Government, since its failure to assess a tax against the trust must be deemed to border on negligence for it was acquainted with the set-up of the trust instrument."

These cases recognize the principle which we are urging in the present case. Equitable consideration certainly does not permit the Government to assert a tax against the trustees at this time. If it should be permitted to do so, the trustees would "suffer a burden" as they would have to bear the whole tax, the estate of H. C. Frick having been settled and fully distributed, and the Government would be "unjustly enriched" because it would be permitted to retain two taxes on the same income assessed for different years.

There Has Been No Conduct, Acts, Language Or Silence On The Part Of The Respondents Amounting to Misrepresentation Or Concealment Of Material Facts.

Equitable estoppel is an affirmative defense and the party evoking such equitable estoppel has the burden of proof to show that all the elements of such estoppel exist. *Helvering v. Brooklyn City R. Co.*, 72 F. (2d) 274; *Tide Water Oil Co.*, 29 B. T. A. 1208; *Sugar Creek Coal & Mining Co.* 31 B. T. A. 344; *Bamberg Cotton Mills Co.*, 8 B. T. A. 1236, 1244.

The record shows that at all times from the filing of the returns in 1921 until the present date both parties were equally possessed of the facts regarding the death of Mr. Frick and the liquidation of the two partnerships. These facts were clearly reflected in the returns filed for the former partnerships of A. Overholt & Co. and West Overton Distilling Company. (Exs. 3, 4; R. 351, 352.) The Commissioner's representatives examined the books and records of respondents and of the two former partnerships and at all times had access thereto. There was no misrepresentation of any fact material to this issue, nor of any other fact. There was a frank disclosure of all the underlying facts upon which the Commissioner could at any time have determined the correct taxpayer. How can the petitioner say, in good conscience, that either he or the Commissioner was misled by respondents?

There was at most a mutual misunderstanding of the law respecting partnerships in liquidation and the taxable liability of the liquidating trustees, and it did not occur to either party that the assessment and collection of tax on the respondents and the estate of the deceased partner might be erroneous as a matter of law,

until after the Commissioner refused to refund the tax for either 1920 or 1925, at which time respondents were forced by his unfair and inequitable action to make a thorough review of their legal rights, with the consequent development of the correct manner and method as a matter of law of assessing and collecting a tax for 1920 if any was due. There is no evidence on which the Court could find that respondents attempted to or did mislead the taxing authorities in any way as to any fact.

Under these facts, the authorities are clearly against petitioner's position. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 327, 335; *Southwestern Investment Co.*, 19 B. T. A. 30 and authorities there cited; *Tide Water Oil Co.*, 29 B. T. A. 1208; *Helvering v. Brooklyn City R. Co.* (C. C. A. 2), 72 F. (2d) 274.

We submit that petitioner has failed to prove any misrepresentation or concealment, and therefore there can be no estoppel.

There Is No Estoppel Where Both Parties Labor Under A Mutual Mistake Of Law.

The situation here arose solely because of both parties' misunderstanding or mistake of law. Both parties knew and had immediate access to all records necessary to determine the underlying facts from which the correct legal conclusion could be drawn. Both parties were equally charged with knowledge of the law and hence neither is bound by estoppel.

The Commissioner, knowing that Mr. Frick had died and that the partnerships were in liquidation, chose to treat the surviving partners, acting as liquidating trustees, and the estate of the deceased partner as members of a continuing partnership and assessed and collected

taxes on that basis. The Commissioner was bound to know the law. He is bound to make his own interpretation of the law and to ascertain all facts. The determination of the correct tax for 1920 was a statutory requirement imposed on him, and neither he, nor the taxpayer, nor both together, can depart from the statutory law. He is required by statute and by regulation to investigate, examine and audit returns (Revenue Act of 1918, Sec. 250 (b); Sec. 1317 amending R. S. 3176; Art. 1012 of Regulations 45), and he has no right to rely on a taxpayer's statement or understanding or position as to the law of the case. *Tide Water Oil Co.*, 29 B. T. A. 1208; *Sugar Creek Coal & Mining Co.*, 31 B. T. A. 344; *Summerfield Co.*, 29 B. T. A. 77; *Helvering v. Brooklyn City R. Co.*, 72 F. (2d) 274; *McIlhenny et al., Executors v. Commissioner*, 39 F. (2d) 356; *Essex Coal Co. v. Commissioner*, 39 F. (2d) 892; *Glavey v. United States*, 182 U. S. 595, 45 L. Ed. 1247; *United States v. Andrews*, 240 U. S. 90, 60 L. Ed. 541; *Dixon County v. Field*, 111 U. S. 83, 28 L. Ed. 360.

In *Helvering v. Salvage*, 297 U. S. 106, 109, the Supreme Court said:

> "* * * Further, that the failure to disclose 1922 taxable gain apparently resulted from innocent mistake of law; there was no false representation of fact; nothing gave support to the claim of estoppel."

In the *Estate of William Steele*, 34 B. T. A. 173, 175, the Court said:

> "* * * We have heretofore held that no estoppel can be predicated on a mistake of law in the absence of some misrepresentation of fact. * * * The rationale of the rule is that everyone being presumed to know the law, the Commissioner is not justified in relying upon the taxpayer's in-

terpretation thereof, and reliance is an essential element of estoppel. The Commissioner is duty bound to think and act for himself and make his own interpretations of the law. *Tide Water Oil Co., supra.*"

In *Commissioner v. Union Pacific R. R. Co.,* 86 F. (2d) 637 (C. C. A. 2), 1936, the question before the Court on appeal from the Board of Tax Appeals was whether profit and loss from certain sales included in the 1926 income were properly allocable to 1917 and 1920. The Commissioner claimed that the respondent was estopped from saying that the income was taxable in years other than 1926. The Court of Appeals refused to affirm this position, saying (p. 639):

"It is argued by the petitioner that the respondent is estopped from making its present claims. An estoppel cannot originate in a mere statement of law or in silence due to an error of law. Moreover, the person claiming the benefits of estoppel must appear ignorant of the true facts and be adversely affected by the acts of the person against whom the estoppel is claimed. 'Estoppel is not an element of income but only a doctrine affecting a liability.' Sugar Creek Coal & Mining Co. v. Commissioner, 31 B. T. A. 344, 346. One who pleads estoppel has the burden of establishing all its elements. Brewerton v. United States, 9 F. Supp. 503 (Ct. Cl.) Here the Board concluded that the failure to report the sales was due to an error both of the taxpayer and of the Commissioner, and there is evidence supporting this conclusion. Under these circumstances, the doctrine of estoppel may not be applied. Salvage v. Com'r, 76 F. (2d) 112 (C. C. A. 2), affirmed Helvering v. Salvage, 297 U. S. 106, 56 S. Ct. 375, 80 L. Ed. 511; Jamieson v. United States, (D. C.) 10 F.

Supp. 321; *contra,* Commissioner v. Farren, 82 F. (2d) 141 (C. C. A. 10). In the Salvage Case, the purchase of stock was not reported in the proper year, yet the taxpayer was allowed to use the cost basis for that year in determining the gain derived from the redemption of the stock. Only an innocent mistake of law was proved, and we held it immaterial that an assessment for that year was barred by the statute of limitations. We commented on Crane v. Commissioner, 68 F. (2d) 640 (C. C. A. 1), and expressed our disagreement with certain views there announced. An unqualified application of the rule that failure to report income creates estoppel would mean that an equitable remedy can serve to nullify the substantive provisions of the statute of limitations as well as the statutory policy that income is to be allocated to its appropriate year, Burnet v. Sanford & Brooks Co., 282 U. S. 359, 51 S. Ct. 150, 75 L. Ed. 383, despite the loss of revenue, Helvering v. St. Louis S. W. Ry. Co., 66 F. (2d) 633 (C. C. A. 8).

* * * * *

"It is nowhere stated that the taxpayer made any misleading statements or concealed the facts, and it is not denied that the interest payments under both contracts of sale were reported in the returns for the respective years. It thus appears that the petitioner did not rely upon the respondent's conduct. The Board was justified, and so are we, in assuming that the petitioner was advised of the facts and merely overlooked their legal significance. Sugar Creek Coal & Mining Co. v. Commissioner, *supra*; cf. Helvering v. Brooklyn City Ry. Co., 72 F. (2d) 274 (C. C. A. 2)."

The doctrine thus illustrated and applied in these tax cases is in accordance with the usual rule obtaining in all civil litigation. If both parties are equally cognizant of the facts, and the action taken was under a mistaken idea of the law, the party so acting cannot say he was deceived thereby and there is no estoppel.

The Party Claiming Estoppel Must Have Been Led By His Reliance On The Conduct Of The Other To Change His Position To His Detriment.

This broad rule is an essential element of all estoppels, and it is so firmly established that it requires no citations for its support. It is made up of two elements. There must be a detrimental change of position and such change must have come from reliance on the conduct of the party against whom estoppel is claimed. He must have acted with reason, and reasonably, and he cannot claim reliance when prudence and intelligence would have dictated a different course. Here neither the Commissioner nor the petitioner may claim reliance on any representation of respondents, not only because the parties were acting under a mistake of law, but also because both were in complete possession of the underlying facts and because there was no misrepresentation or concealment, and lastly, because the change of position by the Commissioner was made, not in reliance upon the position taken by respondents, but directly contrary thereto. In other words, the Commissioner's change of position took place in 1928 and 1929 and consisted in his determination that all the profits should be taxed in 1925 upon final liquidation as capital gain. This was the position originally taken by respondents when the returns for 1920 were filed, and when the returns were examined the Commissioner refused to agree with it and required

the payment of a tax in 1920. There was never any change of position by him as the result of any position taken by respondents, and as we have hereinbefore shown, he is not, as a matter of law, entitled to rely upon a position of law taken by a taxpayer. He was not only free to take a different view and proceed in accordance with the law but was in duty bound to think and act for himself—and did so by twice changing his position.

The Object Of The Doctrine Of Estoppel.

The object of this doctrine is well stated in the *Tide Water Oil* case, 29 B. T. A. 1208, 1224:

> "The object of the rule providing for estoppel is to repress fraud and render men truthful in their dealings with each other. Under that rule *the author of the misfortune* may not himself escape the consequences and cast the burden upon another. Thus the equitable rule of estoppel presupposes an error or fault of some kind by the party estopped, and implies an act in itself invalid. Merchants' Bank v. State Bank, 77 U. S. 604, 645; Brant v. Virginia Coal & Iron Co., 93 U. S. 327, 335; Henshaw v. Bissell, 85 U. S. 255. Whatever doctrine analogous to estoppel the respondent would invoke, it must be founded upon some act or omission of the petitioner for which in equity it should be held to account. The equities must be strong enough to overshadow the law. There is here no suggestion of fraud, untruthfulness, concealment, misrepresentation, omission, negligence, violation of duty, or unfair conduct on the part of the petitioner. It was no more the author of the misfortune than was the Commissioner. The latter was in as good a position as the former to make all proper decisions. Thus, in this case there is no occasion for applying either

the doctrine of estoppel or any doctrine analogous thereto." (Italics ours).

The author of the misfortune in this case is not these respondents but the Commissioner himself. It is a fair inference from the facts (the claim for refund of 1920 tax not having been filed until after the Commissioner reversed his position and included the identical income again in 1925) that if the Commissioner had not changed his position and had not attempted, contrary to honesty and good faith, to collect and retain taxes in two years on the identical income, respondents might not have discovered that as a matter of law the income, if any, in 1920 should have been taxed to the liquidating trustees as separate taxable entities. The equities in this case are all with the respondents. The petitioner is pleading equity, that is, an estoppel, merely because the Statute of Limitations has run against the separate taxable entities for the year 1920, when at the same time he refuses to refund the tax paid on the same income in 1925. Such a plea is not strong enough to overshadow the equities in favor of respondents or to overshadow the law. It is to be remembered when weighing the equities that this record shows that the Commissioner has collected a tax on the same identical income in two separate years, that there are claims for refund, protective only, pending and which have been pending for years, and *there has been no tender on the part of the Commissioner to refund the tax for either year.* The petitioner seeks to retain double benefits. He cannot disaffirm liability to refund the 1920 tax whilst retaining the benefits of the collection in 1925.

As a matter of fact respondents have accepted the determination of the Commissioner that the income in question was taxable income in the year 1925. The claims for refund for 1920 were filed four days after such deter-

mination and show such acceptance. The Commissioner's representatives were advised of such acceptance in the late summer of 1927.

It is to be noted that the Commissioner, after determining in 1929 that no profits were realized until final liquidation in 1925, did not revert to his original position that taxable profits were realized in 1920 until after this litigation was begun. This he cannot do. See *Ohio and Miss. Ry. Co. v. McCarthy,* 96 U. S. 258, 268, 24 L. Ed. 693, 696.

When the Commissioner, who is charged with the statutory duty of ascertaining the correct tax, the correct taxpayer and the assessment thereof, makes a mistake of law, he has no redress at law or in equity if the Statute of Limitations bars assessment and collection against the correct taxpayer unless there has been fraud, misrepresentation, concealment or waiver by the taxpayer. (Cf. *McEachern v. Rose, supra,* where it is held that statutory provisions override equities).

In *Grand Central Public Market, Inc. v. United States,* decided by the District Court for the Southern District of California on January 12, 1938, and not yet officially reported (see 384 CCH ¶ 9048), there is an excellent discussion and analysis of the late cases dealing with estoppel, election and recoupment. The question was whether advance payments for the execution of leases were taxable income in the year of receipt or in the year in which the lease became effective. The court held that bonuses received in the years 1925 to 1928 as advance payments on a lease to take effect in 1929 were not income in 1929 but were income in the prior years although not reported by the taxpayer and although the Statute of Limitations had expired for the earlier years

where the evidence showed that both the Commissioner and the taxpayer were at times undecided as to the proper years in which the bonuses or advance payments were taxable. In its opinion, the court said:

> "Should the taxpayer be penalized for doing, with regard to 1925 income, what the Commissioner —with all of the facts before him—thought proper as to 1931 income? If the law, the regulations, and the current practice, with regard to the reporting of that income, were such that both the Commissioner and the taxpayer were deceived as to the proper years in which the bonuses were taxable the contention surely cannot be made successfully that the taxpayer deceived the Commissioner.
>
> "Is the taxpayer presumed to have the ability to interpret the law more accurately than the Commissioner, so that what was the error of the Commissioner was the deceit of the taxpayer? We think the answer must be in the negative; it is of course fundamental that estoppel cannot be predicated on errors of judgment by the person asking its benefit. (*Helvering v. Salvage,* 297 U. S. 106 * * *)"

In *S. F. Scott & Sons, Inc. v. United States* (D. C. Mass.), November 17, 1932, and not reported, aff'd 69 F. (2d) 728 (C. C. A. 1), a tax for 1918 due and paid by Scott as an individual was later assessed against and collected from a corporation which was organized in 1919. Thereafter the tax paid by Scott was refunded. The corporation sued to recover and was successful. The Court said:

> "There is no equity in this case. S. F. Scott took advantage of the option given him by Section 330, and now the corporation seeks to recover the tax which it paid, alleging various reasons for supporting its unjust demand. *Unfortunately one of*

the reasons is compelling. The Department taxed the wrong taxpayer. Artemus Ward, Inc., 21 B. T. A. 1096; Murphy Dillon Co., 23 B. T. A. 1320; Sadowsky v. Anderson, 29 F. (2d) 677, 678; Clift & Goodrich, Inc. v. U. S., 56 F. (2d) 751, 752; Dreyfus Dry Goods Co. v. Lines, 24 F. (2d) 29.

"The corporation did not owe the tax, as it was not in existence in the year 1918, for which the tax was laid. *The Department must follow the rules of law. The Department ran the wrong way with the ball, and it cannot complain because the rules require that a score be imposed against it rather than in its favor. The corporation was not off-side* (*there was no misrepresentation of fact*—Murphy Dillon Co., 23 B. T. A. 1320; Gott v. Live Poultry Transit Co., 153 Atl. Rep. 801, 805 (Del.)) so the score must stand." (Italics ours.)

V.

The Tax Liability of Respondents for 1925 Has Been Officially Determined by the Commissioner.

The Government argues (Brief, pp. 89-93) that the tax liabilities of respondents for 1925 have not been finally determined and cannot affect its affirmative defense. It forgets that that defense is based on what it now terms to be "equity and good conscience," relying almost entirely on the decision of this Court in *Stone v. White,* hereinbefore distinguished. How can a litigant plead in defense "equity and good conscience" when it retains taxes assessed and collected on the same identical income in two different taxable years and refuses to refund or even tender the tax for either year?

If the Government had made a tender of refund for the tax for 1925 it might have some standing in a court

of equity. But it does not come into this Court "with clean hands" as it has refused to do equity and, therefore, it cannot avail itself of an equitable defense.

The statement that the liability for 1925 has not been finally determined by the Commissioner is contrary to the statutes and decisions. The Commissioner on March 15, 1929, made a determination that all profit was realized upon final liquidation in 1925 and taxable in that year (Exs. BB, CC; R. 491, 497), and that determination is his official statutory determination. That determination is *prima facie* correct. *United States v. Rindskopf,* 105 U. S. 418; *Welch v. Helvering,* 290 U. S. 111, 115.

The filing of a claim for refund does not alter the fact that the Commissioner has made his official determination nor destroy the presumption of correctness attached thereto.

The Government attempts further to becloud the issue by referring (Brief, pp. 92-93) to proffered evidence rejected upon objection, as to which no assignment of error has been made in this Court, a practice never countenanced. Statements outside the record are made that the claims for refund of the 1925 taxes filed by the respondents for their own protection have not been acted upon in order to protect the interests of the Government; but if the Government were turning "square corners" with its taxpaying citizens, *Howbert v. Penrose* (C. C. A. 10) 38 F. (2d) 577, 581 (see *Kansas City Southern Railway Co. v. Commissioner,* 75 F. (2d) 786, 790-91), it would have long since considered those claims for refund and, if it thought the Commissioner had erred in either 1920 or 1925, it would have made the proper adjustments and tendered refund of either the 1920 or the 1925 re-

sultant overpayment or reversed its position as to 1925 and rejected the refund claims.

Never has it been possible for respondents to get the Commissioner to take a definite and final position on this tax question. Never has the Commissioner said that if the Court holds that the alleged earnings were taxable in 1920, he will refund the tax paid on the same earnings in 1925. He is obviously trying to hold the money received for each year and consequently to have collected a tax on the same income for two separate years. The Government now says in its brief (p. 91), "It cannot be assumed, however, that a refund will be due for 1925, whatever the outcome of these cases," and intimates that the Commissioner will make a redetermination of respondents' tax liability on a basis which we may well assume will be satisfactory to him and will show no payment due to the respondents. The Commissioner has had many years to make the refund for 1925, or to redetermine the tax liability for that year, if he so desired, and his delay and his failure to take any action has served to prejudice respondents and it is the best evidence of lack of good faith.

Under all the attendant circumstances disclosed by the record in these cases, the plea of "equity and good conscience" comes with ill grace from a sovereign government, has no merit and should be disregarded.

Conclusion.

The ultimate findings of the lower courts are supported by the evidence and the judgments are supported by the findings.

No taxable income was realized by respondents in 1920. If it be held that taxable income was realized in

1920 from the sale of whiskey certificates, it was realized by, assessable against and taxable to, the surviving partners of the dissolved partnerships as trustees, separate taxable entities, and the tax thereon was illegally assessed against and collected from the respondents.

The Government failed to do equity and cannot rely on an equitable defense. None of the elements of estoppel was present in these cases and respondents are not barred from recovery.

The judgments below should be affirmed.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

"Sec. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

"The partner shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the partnership."

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

"(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

"(3) Income held for future distribution under the terms of the will or trust; and

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

"(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *"

"Sec. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is $1,000 or over if single or if married and not living with husband or wife, or $2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is $1,000 or over or if any beneficiary of such estate or trust is a non-resident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the Secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same

is, to the best of his knowledge and belief, true and correct.

"Fiduciaries required to make returns under this Act shall be subject to all the provisions of this Act which apply to individuals."

"Sec. 200. That when used in this title—

* * * *

"The term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust or estate;"

* * * *

Treasury Regulations 45:

"Art. 1570. Readjustment of partnership interests.—When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which the income tax has been paid. If, however, the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received on distribution. See article 1566. Whenever a new partner is admitted to a partnership or any existing partnership is reorganized, the facts as to such change or reorganization should be fully set forth in the next return of income, in order that the Commissioner may determine whether any gain

or loss has been realized by any partner. See also article 1563."

"Art. 1521. *Fiduciary.*—'Fiduciary' is a term which applies to all persons that occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators, and a fiduciary for income tax purposes is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest or receives and controls income of another as in the case of receivers. A committee of the property of an incompetent person is a fiduciary. See sections 219 and 225 of the statute and articles 341-344 and 421-425."

SUPREME COURT OF THE UNITED STATES.

Nos. 144, 145.—October Term, 1937.

144 D. B. Heiner, Petitioner, *vs.* Paul Mellon, et al., Executors.

145 D. B. Heiner, Petitioner, *vs.* Jennie King Mellon, et al., Executors.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 16, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, tried below in the federal court for western Pennsylvania and argued together here, arise from the same facts and present the same questions of law. Each action was brought against D. B. Heiner, as former Collector of Internal Revenue and individually, to recover an amount paid under protest by the taxpayer in 1927 upon a deficiency assessment of his 1920 income tax. The amounts taxed as additional income were the distributive shares of certain profits alleged to have been earned by each in 1920 as a partner in two firms. Due demand for a refund was made. In No. 144 the taxpayer was A. W. Mellon; in No. 145, R. B. Mellon. Both having died, the suits are by their executors. In No. 144, the District Court entered judgment for $202,502.22 with interest (14 F. Supp. 424); in No. 145 for $187,787.17 with interest. These judgments were affirmed by the Court of Appeals (89 F. (2d) 141). Certiorari was granted because of alleged conflict as to applicable rules of law important in the administration of the revenue laws. 303 U. S. —.

There is no dispute as to the relevant facts. Prior to December 12, 1918, A. W. Mellon, R. B. Mellon and H. C. Frick each owned one-third of the entire capital stock of two distilling corporations—A. Overholt & Company and West Overton Distilling Company. On that day those three individuals formed

two partnerships in which each partner was to have a one-third interest. In January 1919 they caused to be transferred to the partnership called A. Overholt & Company all the assets of the corporation of that name; and to the partnership called West Overton Distilling Company, all the assets of that corporation. These assets included large whiskey inventories in bonded warehouses. Neither corporation had distilled any whiskey after 1916. Liquidation of the businesses of each had been started by the two corporations in 1918; and the partnerships had been organized for the purpose of liquidating them. The business of each partnership in 1920, had, like its business in 1919, consisted in the sale of whiskey certificates and the storage, bottling, casing and sale of the stock of whiskey. It was not until 1925 that the assets of the partnerships then remaining were sold in bulk, and the proceeds distributed among those entitled thereto.

Frick died December 2, 1919; but throughout 1920 the businesses of A. Overholt & Company and of West Overton Distilling Company were conducted, and their books were kept, in the same manner as the businesses had been conducted and books had been kept by the partnerships in 1919, and by the corporations in 1918. For 1920 the partnership returns of the two concerns disclosed facts from which it appeared that substantial gains had been made from the sale of whiskey. But the amounts were not reported as income of the partnerships; and neither A. W. Mellon nor R. B. Mellon included in their income tax returns for 1920 any amount on account of them. The Commissioner of Internal Revenue determined that these sums were distributive profits; that the returns of taxable income of A. W. Mellon and of R. B. Mellon for the year 1920 should have included one-third of the profits in that year of each firm from the sale of whiskey; and made a deficiency assessment on A. W. Mellon of $190,419.70 and on R. B. Mellon of $175,259.70.

The Revenue Act of 1918[1] governs taxation of 1920 income. Section 218(a) of the Act provides that individuals carrying on business in partnership shall be liable in their individual capacities for the income tax on profits earned therein, and that in computing the net income of each partner there shall be included his distributive

[1] Act of February 24, 1919, c. 18, 40 Stat. 1057.

share, whether distributed or not, of the net income of the partnership for the taxable year. Section 224 provides that the partnership shall file an informational return setting forth the items of its gross income, the deductions allowed and the distributive share of net income to which each partner is entitled.

The two Mellons filed their individual returns for 1920, and also the informational partnership returns for that year. While the Mellons claimed that they were not taxable on their share of the profits from whiskey sold in 1920, they recognized that they were taxable for their shares of these other profits of the concerns earned in 1920. The partnership returns in the case of each concern showed a gain arising from storage, bottling and casing operations, sales of barrels, interest and rentals. One-third of each of these profits was entered by each of the Mellons in his individual return as his distributive share of the profits of the two partnerships.

First. The primary question for decision is whether the net profits made by the two partnerships in 1920 from the sales of whiskey were in their nature taxable income. Throughout 1920, A. Overholt & Company and the West Overton Distilling Company were engaged in business. The mere fact that the purpose of the partnerships was to liquidate the assets taken over from the corporations is not of legal significance. Profits made in the business of liquidation are taxable in the same way and to the same extent as if made in an expanding business. Nor is it of legal significance that the liquidation was not completed until 1925 and that until completion of the liquidation it could not be known whether the business venture, taken as a whole, had been profitable. The federal income tax system is based on an annual accounting.[2] Under that law the question whether taxable profits have been made is determined annually by the result of the operations of the year.

Purchasing real estate, subdividing and selling it in parcels is, in essence, a liquidating business. The claim has been repeatedly made that no income was realized until the investment was recouped; but the Board of Tax Appeals has uniformly held in accord with Article 43 of Regulations 45 (and later regulations) that the

[2] Burnet v. Sanford & Brooks Co., 282 U. S. 359, 365; Burnet v. Thompson Oil & Gas Co., 283 U. S. 301, 306; Woolford Realty Co. v. Rose, 286 U. S. 319, 326; Brown v. Helvering, 291 U. S. 193, 198-99; Helvering v. Morgan's Inc., 293 U. S. 121, 126-127; Guaranty Trust Co. v. Commissioner, 303 U. S. —, — [decided March 28, 1938.]

cost of the real estate must be apportioned among all the lots, and income returned upon the sales in each year, regardless of the number of lots remaining undisposed of at the close of the tax year.[3] A like rule has been applied where the taxpayer had purchased personal property in a block and was engaged in selling it in parcels. The claim that there was no taxable income until the capital had been returned was rejected.[4]

The fact that it might prove that when the business was fully liquidated the profits of 1920 were offset by heavy loss of later years is immaterial. Losses suffered by a taxpayer in a later year may be deducted from profits, if any, earned by him in that later year; but the tax on a year's income may not be withheld because losses may thereafter occur. If A. Overholt & Company and West Overton Distilling Company had remained corporations they would have been obliged to make each year return of the profits made therein and pay taxes annually throughout the period of liquidation although it might ultimately prove that the losses of the later years exceeded the profits of the earlier ones.[5] Likewise, if the concerns had each been owned by a single individual, the fact that his sole business was liquidating the concern would not have relieved him from paying annually taxes on the net profits. No good reason is suggested why a different rule should apply to partnerships.

We conclude that gains from the sale of whiskey in 1920 were income of that year. The amount of the income was determinable

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[3] J. S. Cullinan, 5 B. T. A. 996, 19 B. T. A. 930; Thomas J. Avery, 11 B. T. A. 958; Brodie C. Nalle, 19 B. T. A. 427; Frederika Skinner, 20 B. T. A. 491. See also B. S. Roberts, 7 B. T. A. 1162; Hannibal Missouri Land Co., 9 B. T. A. 1072; P. C. Clarke, 22 B. T. A. 314, 325; Biscayne Bay Islands Co., 23 B. T. A. 731; Searles Real Estate Trust, 25 B. T. A. 1115. Compare Perkins *v.* Thomas, 86 F. (2d) 954, 956 (C. C. A. 5), affirmed on other grounds, 301 U. S. 665; see also Elmhurst Cemetery Co. *v.* Commissioner, 300 U. S. 37.

[4] Santa Maria Gas Co., 10 B. T. A. 1412; American Industrial Corp., 20 B. T. A. 188; Bancitaly Corp., 34 B. T. A. 494. Compare Weser Bros., Inc., 12 B. T. A. 1394; C. H. Swift & Sons, Inc., 13 B. T. A. 138; Deer Island Logging Co., 14 B. T. A. 1027; O. H. Himelick, 32 B. T. A. 792.

[5] See Regulations 45, Art. 547; Tazewell Elec. Light & Power Co. *v.* Strother, 84 F. (2d) 327 (C. C. A. 4); Northwest Utilities Securities Corp. *v.* Helvering, 67 F. (2d) 619 (C. C. A. 8); First Nat. Bank of Greeley *v.* United States, 86 F. (2d) 839 (C. C. A. 10). Compare Burnet *v.* Lexington Ice & Cold Storage Co., 62 F. (2d) 906 (C. C. A. 4); Taylor Oil and Gas Co. *v.* Commissioner, 47 F. (2d) 108 (C. C. A. 5); Hellebush *v.* Commissioner, 65 F. (2d) 902 (C. C. A. 6); Whitney Realty Co. *v.* Commissioner, 80 F. (2d) 429 (C. C. A. 6).

from the partnership books. Section 212(b) of the Revenue Act of 1918 provides that the net income shall be computed "in accordance with the method of accounting regularly employed in keeping the books of" the taxpayer, and it is not shown that the method employed clearly failed to reflect net income.

Second. The fact that the partnerships had been dissolved by Frick's death before 1920 does not affect the liability of the Mellons as surviving partners for income taxes on their distributive shares of the net profits made in that year. Compare *Rossmoore* v. *Anderson*, 1 F. Supp. 35 (S. D. N. Y.), affirmed, 67 F. (2d) 1009 (C. C. A. 2); *Rossmoore* v. *Commissioner*, 76 F. (2d) 520 (C. C. A. 2). The business of A. Overholt & Company did not terminate on Frick's death. Although dissolved, the partnerships and the business continued, since, as stated in the Pennsylvania Uniform Partnership Act: "On dissolution the partnership is not terminated, but continues until the winding up of the partnership affairs is completed."[6] Throughout the year 1920, the business of selling stock on hand and deriving income therefrom was carried on precisely as it had been theretofore, and for the same purpose. Article 424 of Regulations 45 recognizes that even in the hands of a receiver a partnership must file a return.

Third. The Mellons contend, and the court below held, that the partners' interests in the partnerships were capitalized upon dissolution, so that until the liquidation returned to them the cost of their interests, no taxable income was received; that Article 1570 of Regulations 45 so provides; and that this did not take place before 1925. But, as already pointed out, technical dissolution does not affect the liability of a partner under Section 218 for taxes on his distributive share of the partnership's income; and Article 1570 does not establish any rule that dissolution capitalizes the interest of a partner in future partnership profits. The article provides:

"When a partner retires from a partnership, or it is dissolved, he realizes a gain or loss measured by the difference between the price received for his interest and the cost to him or (if acquired prior thereto) the fair market value as of March 1, 1913, of his interest in the partnership, including in such cost or value the amount of his share in any undistributed partnership net income earned since February 28, 1913, on which income tax has been paid. . . ."

[6] Pa. Laws 1915, No. 15, § 30, Pa. Stat. Ann. (Purdon, 1930) Tit. 59, § 92.

This article is in no way inconsistent with the taxation of a partner on his share of the income of the partnership earned in a single year after dissolution but before completion of liquidation and distribution. It deals only with the determination of a partner's gain or loss on his investment when he completely severs his connection with the partnership and its assets. The gain or loss is determined substantially like that on any other business venture of the individual, treated as a whole. On the other hand, the profits from the sale of whiskey in 1920 were current income of the partnership for that year, not different in their nature from the profits from storage, bottling, casing, and similar operations which the Mellons returned as income. Article 1570 does not deal with this situation.

Fourth. The Mellons contend that because the partnerships were dissolved by the death of Frick in 1919, A. W. Mellon and R. B. Mellon, being surviving partners, became by operation of law liquidating trustees; that any income earned in 1920 from operations of the dissolved partnerships was income to the Mellons only in their fiduciary capacity as such trustees; that under Section 219 of the Revenue Act of 1918 the trust estate was a separate taxable entity; that if any income tax was due, it was therefore due from the trust, and that its assessment is now barred by the statute of limitations.

We do not find it necessary to determine whether assessment of the tax on this theory is now outlawed, or whether, as the Collector urges, recovery is precluded in any event under the doctrine of *Stone* v. *White*, 301 U. S. 532; for we are of the opinion that the Mellons are not trustees within the meaning of Section 219. The fact that they may be so denominated by the law of Pennsylvania is not conclusive. It is well settled that in the interpretation of the words used in a federal revenue act, local law is not controlling unless the federal statute "by express language or necessary implication, makes its own operation dependent upon state law." "The state law creates legal interests, but the federal statute determines when and how they shall be taxed." *Burnet* v. *Harmel*, 287 U. S. 103, 110.[7] We think it is clear that under the circumstances set

[7] See also Burke-Waggoner Oil Association v. Hopkins, 269 U. S. 110, 113, 114; Palmer v. Bender, 287 U. S. 551, 555-56; Thomas v. Perkins, 301 U. S. 655, 659; Biddle v. Commissioner, 302 U. S. —, —. Compare Chicago Board of

forth, the income earned in 1920 was income of a partnership "carrying on business" within the meaning of Section 218 rather than of a trust under Section 219.

The obligation of the Mellons to pay, under the federal law, taxes on the profits made in 1920 from sales of whiskey is in no way affected by their fiduciary obligation under the law of the State to account to the Frick estate for its interest in the two partnerships being liquidated. The surviving partners continued during 1920 to conduct the business from which they earned profits. On such income the federal law required that taxes be paid. It did not require that the payments be made from the partnership assets. How the assets shall be disposed of, and what shall be done with the proceeds when realized, are matters which may be determined by the law of the State or by agreement of the partners. But however the assets are required by the law of the State to be disposed of, or the proceeds applied, the federal law requires that taxes be paid if, in disposing of them within the year the business is conducted and profits are made.

Fifth. The Mellons contend that under the law of Pennsylvania no distribution of profits could lawfully have been made by the surviving partners as liquidating trustees until all debts and liabilities, contingent or otherwise, had been paid or satisfied, and the partners' capital returned; and that although the business of the partnerships had been carried on after dissolution precisely as before, and the partnership accounts for the year 1920 showed large profits earned, their respective shares of them were not distributable and could not be deemed taxable income of the partners.

Section 218(a) of the Revenue Act of 1918 provides that "There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. . . ." If "distributive" meant "currently distributable under state law", the contentions made by the Mellons might have some force. But it does not.

Trade v. Johnson, 264 U. S. 1, 8-11; United States v. Robbins, 269 U. S. 315, 327-28; Corliss v. Bowers, 281 U. S. 376, 378; Tyler v. United States, 281 U. S. 497, 503. See also Hart v. Commissioner, 54 F. (2d) 848, 851 (C. C. A. 1); Fidelity-Philadelphia Trust Co. v. Commissioner, 47 F. (2d) 36, 38 (C. C. A. 3); Rosenberger v. McCaughn, 25 F. (2d) 699 (C. C. A. 3); Eagan v. Commissioner, 43 F. (2d) 881, 883 (C. C. A. 5); Fritz v. Commissioner, 76 F. (2d) 460, 461-62 (C. C. A. 5).

Article 322 of Regulations 45 (and corresponding articles of subsequent Regulations) defines "distributive" as meaning "proportionate." Compare *Earle v. Commissioner*, 38 F. (2d) 965, 967-68 (C. C. A. 1). And Section 220 of the Revenue Act of 1918, taxing to the shareholders the income of a corporation improperly accumulating its gains and profits for the purpose of avoiding surtax, assumes that the two words are synonymous. The tax is thus imposed upon the partner's proportionate share of the net income of the partnership, and the fact that it may not be currently distributable, whether by agreement of the parties or by operation of law, is not material.[8] No claim is made that the proportionate interests of the surviving partners was improperly determined by the Commissioner.

Sixth. Finally, the Mellons contend that in 1928 and 1929 the Commissioner determined that no profit was realized until final liquidation of the partnerships in 1925, and that income taxes for that year have been collected on this theory and not yet refunded. The Commissioner's alleged change of position is not here important. It is not shown that refund of these taxes is now barred. Nor is it necessary for us to consider the cost to the Mellons of their interests in these partnerships, or whether the Mellons' 1925 income taxes were erroneously assessed and collected, or whether the Commissioner correctly settled the tax liability of the Frick estate. None of these questions has any bearing upon the determination of the case before us.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[8] Compare Earle *v.* Commissioner, 38 F. (2d) 965 (C. C. A. 1); Hill *v.* Commissioner, 38 F. (2d) 165, 168 (C. C. A. 1); Pope *v.* Commissioner, 39 F. (2d) 420 (C. C. A. 1); Ruprecht *v.* Commissioner, 39 F. (2d) 458 (C. C. A. 5); Benedict *v.* Price, 38 F. (2d) 309 (E. D. N. Y.); W. Frank Carter, 36 B. T. A. 60. See also O. D. 187, 1 C. B. 174.